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Supreme Court, U.S.
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NO. 85-659

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

ALWIN E. HOPFMANN,

Petitioner,

v.

UNITED STATES FEDERAL ELECTION COMMISSION, EDWARD M. KENNEDY and THE COMMITTEE TO RE-ELECT SENATOR KENNEDY,

Respondents.

# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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89 pgs

## QUESTIONS PRESENTED

I. Questions Presented By The Dismissal Of Appellant's Complaint To The Federal Election Commission

1. Does a federal administrative agency, charged with enforcement of the federal election laws passed by Congress, and with the task of developing a body of de facto precedent now embodied mainly through its Advisory Opinions, have authority to, or indeed may it, base an Advisory Opinion dismissing an administrative complaint in part upon deference to, or acceptance of, a state court advisory opinion that places a new interpretation upon the federal Constitution that conflicts with the unanimous opinion of this Court in Smiley v Holm, 285 US 355 (1932, opinion by Mr. Chief Justice Hughes,) and Art.I, Sec. 4, Cl. 1, as well as the First, XIVth and XVIIth Amendments

in that this Advisory Opinion sanctions a political party adding to state election laws in defiance of the state legislature under a claimed First Amendment freedom of association; or, does that agency, in so basing its opinion, surreptitiously and improperly overturn Smiley in a manner to render its decision erroneous ?

2. Does the mere "possibility" of a "write-in" candidacy, which this Court has indicated is of dubious validity as a substitute for ballot access improperly denied in Lubin v Panish, 414 US 709, and McCarthy v Briscoe, 429 US 1317, and which this Court in US v Classic, 313 US 299, held was not enough to prevent an otherwise improper constriction upon ballot access from being unconstitutional, in the situation where no blank space for a "write-in" is provided on the ballot, does

such a mere "possibility" make a legislatively repudiated and unsanctioned pre-primary convention not an "election" under the definition of 2 U.S.C. 431 (1) (B); or, is that contention, upon which the FEC here based its dismissal, erroneous ?

3. Even if the so-called authority by which a party pre-primary convention eliminates all but one candidate from a primary ballot, resulting in a "no-contest" primary, is unconstitutional, yet if this authority is nonetheless exercised by state and party officials under color of a claimed First Amendment right to be able both privately and without delegation from the legislature, and, in fact, in defiance of the legislature, to "add" to the state statutory scheme, so as to provide the color of state law to their actions, is this not an "authority to

nominate a candidate" at that convention as a matter of law, so as to make even an illegal pre-primary convention an "election" under the clear language of 2 U.S.C. 431 (1) (B), since, absent any attempt at a write-in campaign, the actual primary contest has been terminated ?

4. Is it not arbitrary, capricious, and an abuse of discretion for the Federal Election Commission, which had previously advised in its Advisory Opinions, which have the power of judicial orders and effectively set precedent, that the elimination of candidates at a convention, where those same eliminated candidates did not then institute any sort of challenge, including a "write in," made the candidate-eliminating convention an "election" under 2 U.S.C. 431 (1) (B) as being "tantamount to an election," to

suddenly change its established holding and decide that the mere "possibility" of a "write-in" candidacy even where that possibility is not exploited, makes a convention that eliminates all candidates save one from the ballot not an "election" as previously held under that statutory section ?

5. Is it not arbitrary, capricious, and an abuse of discretion for a federal agency, upon receipt of a complaint of an alleged violation of the laws it is entrusted with enforcing, to take the representation of the party complained of at face value as to what is an accurate analysis of State law pertaining to the power and role of a political party convention in the nomination of candidates for Federal office, when the documents accompanying the administrative complaint

show clearly that the so-called "State law" alleged by the party complained about is merely a non-binding advisory opinion and a distortion of a claimed right under the First Amendment to the Constitution of the United States and, further, not to do research or make any independent analysis of that representation of the party complained about ?

## II. Questions Presented As A Result of Appellant's Challenges Pursuant To 2 U.S.C. 437h

6. Did this Court mean what it said in its unanimous opinion in Bread Political Action Committee v Federal Election Commission, 455 US 577, (1982) when it said that "the plain language of Section 437h(a) controls its construction, at least in the absence of 'clear evidence,'...of a 'clearly expressed legislative intention to the contrary,'"

and does, therefore, that mandate hold with regard to the language of 2 U.S.C. 437h (a) where it says that: "The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc"; or, does that clear language not mean what it says, but rather mean that only certain questions, those considered by the district courts as not "frivolous" must be so certified, not referring to the finding of frivolity as pursuant to the inherent powers of the court, but rather as pursuant to a specific statutory mandate set out in the In Forma Pauperis Statute, 28 U.S.C. 1915, as stated by the district court for the Eastern District of California in Gifford v Congress, 452 F Supp 802 (ED Cal 1978), as footnoted earlier by the majority of

this Court in Note 14 to the opinion in California Medical Association v Federal Election Commission, 453 US 182, (1981) ?

7. If this Court did not mean what it said in Bread Political Action Committee, supra, should the serial assertion of the use of the In Forma Pauperis statute (As relied upon in Gifford, supra ) as one of number of restrictions upon "the potential abuse of Section 437h" [of the Federal Election Campaign Act, 2 U.S.C. 431, et seq.] along with a number of other such restrictions in Note 14 of California Medical, supra, be expanded and taken out of its immediate context so that the explicit statutory provision of 28 U.S.C. 1915 concerning the mandate to district courts to make a preliminary finding of frivolity or lack thereof is surreptitiously expanded by action of the lower

court to embrace the situation where no such explicit mandate applies, and, in fact, where 2 U.S.C. 437h mandates the "immediate" certification of "all" constitutional questions, bypassing the first two levels of the normal federal judicial process, and where the preceeding footnote, Note 13, characterizes such efforts as "rewriting Section 437h" and states that the "remedy" for "criticisms" of the statute is with Congress ?

8. Can the procedural mandate of 2 U.S.C. 437h commanding the district courts to certify immediately, as a matter of procedure, "all" constitutional questions raised about the Federal Election Campaign Act, 2 U.S.C. 431 et seq., to the full panel of the court of appeals sitting en banc be ignored and defied based on the desire of the district court to avoid that

mandate as expressed in clear language and substitute in its stead an expanded interpretation of the application of the "frivolity" provision of the In Forma Pauperis Statute, supra, pursuant to the Footnote in California Medical, supra, so as to overturn the long established principle under the Separation of Powers that Congress and not the judiciary shall set procedure for the inferior federal courts as set out 150 years ago in Wayman v Southard, 23 US 1, (1825), followed by Keary v Farmers & Merchants Bank, 41 US 89 (1842), and Railway Co. v Whitton's Adm'r, 80 US 270 (1872) ?

9. Can the jurisdictional mandate of 2 U.S.C. 437h commanding the bypassing of the first two levels of the normal federal judicial process and the immediate certification of all constitutional challenges

to the Federal Election Campaign Act to the courts of appeals sitting en banc be defied and avoided by the lower federal courts based on the aforesaid expansion of a footnote, so that the district courts retain jurisdiction and even pass upon the merits of some of the constitutional challenges raised, in reversal of the longstanding precedents of this Court holding that Congress shall set the jurisdiction of the inferior federal courts in Jecker v Montgomery, 54 US 498 (1852), Ex Parte McArdle, 7 Wall 506, 514 (1869) and Kline v Burke Constr. Co., 260 US 226 (1922) ?

10. Can lower federal courts defy the former mandates of 2 U.S.C. 437g and h that cases thereunder be moved to the head of the calendar ahead of all other cases and thus delay the cases so that justice shall be denied ?

11. Can the following questions concerning the constitutionality of the provisions of the Federal Election Campaign Act, 2 U.S.C. 431 et seq., raised in a suit pursuant to 2 U.S.C. 437h, be held to be "frivolous" under the In Forma Pauperis Statute, 28 U.S.C. 1915, as expanded in this Court's footnote in California Medical, supra, so as to justify a court's defying the clear language of 2 U.S.C. 437h and refusing to certify them immediately to the full panel of the court of appeals sitting en banc, given that almost all of them have been raised in congressional testimony, in the Congressional Record, or by federal judges:

A. Does the advisory opinion power granted in 2 U.S.C. 437f and empowered by 2 U.S.C. 437d (a)(7) and now used to

propound what are effectively case law decisions (in the place of what should be a body of properly developed federal regulations) violate the "case or controversy" requirement of the Constitution in that 2 U.S.C. 437g, as it has been applied regarding enforcement, allows the FEC to act as a court and to use its own Advisory Opinions, which have been developed apart from the standard pattern for the development of new federal regulations (comprised of hearings, followed by posting for public comment and congressional review, and with a pause before implementation), as if they were law, a practice in which the FEC has continually been engaged as witnessed in congressional testimony and court proceedings ?

B. Does inclusion of a senate employee and officer, the Secretary of the Senate,

on the Federal Election Commission sitting without vote pursuant to 2 U.S.C. 437c (A)(1) violate the "Separation of Powers" requirement of the Constitution, particularly where, as here, the FEC must rule upon a complaint against an incumbent member of the senate ?

C. Are the advisory opinion powers of 2 U.S.C. 437d (a)(7), together with the enforcement power and authority granted by 2 U.S.C. 437g, so ultra vires under the rule of U.S. v Storer Broadcasting Company, 351 US 192; CAB v Delta Air Lines, 367 US 316; National Petroleum Refiners Ass'n v FTC, 340 F.Supp. 1343 (D.C.D.C. 1972) that they violate the requirements for a standard upon delegated congressional authority under the Constitution ?

D. Do the advisory opinion powers delegated to the FEC by 2 U.S.C. 437f as

empowered by 2 U.S.C. 437c (A)(1), together with the enforcement power and authority granted by 2 U.S.C. 437g, constitute an invalidly delegated grant of the power placed in each House of Congress by Art. I, Sec. 5 to judge the elections of its own members ?

E. Do the powers mentioned in D. above violate the Times, Places and Manners Clause, Art. I, Sec. 4, Cl. 1; the constitutional right to a jury trial associated with right to petition for quo warranto; the right to petition for redress of grievances under the First Amendment; and the rights of equal protection, due process and fairness under the Fifth and Fourteenth Amendments in that the resulting enforcement procedures can and do, as they did in this case, favor the party complained about in a biased fashion and deny an effective

remedy where the complaining party, as here, is the opposing candidate actually injured by the actions complained of ?

12. In the face of the mandate of 2 U.S.C. 437h that "all" constitutional questions be certified immediately to the full panel of the court of appeals sitting en banc, may the district court consider and render an opinion on some of the constitutional challenges that a plaintiff brings pursuant to that provision, thus defying the clear language of the statute bypassing the district courts, while ignoring others of the challenges raised, and asserting an authority to dismiss all of the challenges pursuant to 28 U.S.C. 1915 as claimed to be enlarged by the lower courts by virtue of the authority of the footnote in California Medical, supra?

13. As a matter of fairness, where the FEC has delayed twice for substantial periods by missing filing deadlines for reasons such as "high turnover on the staff" and other similar reasons and been routinely granted filing extensions, is it proper for the appeals court to attempt to dismiss the complainant's case for the reason, inter alia, that complainant, who was, in an almost unheard of action, denied permission (pursuant to Rule 40(c) of the Federal Rules of Appellate Procedure) to file the appendix after the filing of the answer by the FEC, where the court gave the complainant 10 days after denying his Rule 40 (c) motion to file a voluminous appendix, which wound up being three volumes in length; and where complainant then missed the filing deadline by two days for reasons similar to those for which the FEC was granted

time extensions; and the court's deputy clerk then went on vacation and failed to notify the complainant that the filing failed to comply with the part of the court's rules dealing with the physical binding of these appendices, so that the appendix was not brought into conformity with the rules until several weeks later; and, unquestionably, no substantial prejudice resulted ?

NO._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

ALWIN E. HOPFMANN,

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UNITED STATES FEDERAL ELECTION COMMISSION, EDWARD M. KENNEDY and THE COMMITTEE TO RE-ELECT SENATOR KENNEDY,

Respondents.

# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1985

No._____

ALWIN E. HOPFMANN, Petitioner,

v.

UNITED STATES FEDERAL ELECTION COMMISSION,
EDWARD M. KENNEDY, and
THE COMMITTEE TO RE-ELECT SENATOR KENNEDY,
Respondents,

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE
DISTRCT OF COLUMBIA CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

ALWIN E. HOPFMANN, the petitioner herein, prays that a writ of certorari issue to review the judgment of THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT entered in the above-entitled case on May 13, 1985.

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1985

No. _____

ADMIN E. SOFFMANN, Petitioner,

v.

UNITED STATES FEDERAL ELECTION COMMISSION,
EDWARD M. KENNEDY, and
THE COMMITTEE TO RE-ELECT EDWARD KENNEDY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
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To the Honorable, the Chief Justice
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ADMIN E. SOFFMANN, the petitioner
herein, prays that a writ of certiorari
issue to review the judgment of THE UNITED
STATES COURT OF APPEALS FOR THE DISTRICT
OF COLUMBIA CIRCUIT entered in the above-
entitled case on May 13, 1985.

## OPINIONS BELOW

The opinion of the defendant/respondent Federal Election Commission, in the form of an EXPEDITED FIRST GENERAL COUNSEL'S REPORT dated October 22, 1982, was unreported. It was adopted by the FEC, under applicable case law, as its opinion in communicating to complainant/petitioner Hopfmann its dismissal of his administra-tive complaint in its communication to him of October 25, 1982. This opinion-report is reproduced in the appendix, Vol. 1, appendix A. The opinion of the United States District Court for the District of Columbia, granting summary judgment to the FEC as to plaintiff/petitioner Hopfmann's petition-appeal to that court of the dismissal of his administrative complaint and also dismissal of his challenges to various provisions of the Federal Election Campaign Act, (FECA), was reported in CCH

Federal Election Campaign Financing Guide Par. 9203. The decision of the United States Court of Appeals for the District of Columbia, affirming the decision of the district court with a memorandum under Local Rule 8(b), from which this petition for the writ of certiorari is taken, was reported at 762 F2d 138 (table) and portions selected by the FEC were reported by the FEC in the FEC RECORD, Vol. 11, Number 7, July, 1985. The district court opinion and order and the memorandum opinion of the court of appeals affirming it are reproduced in the appendix, Vol. 1, appendices B and C.

## STATEMENT OF THE GROUNDS ON WHICH THE JURISIDICTION OF THIS COURT IS INVOKED

The petitioner ALWIN E. HOPFMANN seeks review of the judgment and opinion of the United States District Court for the District of Columbia rendered and entered on March 8, 1984, as affirmed by a judgment and memorandum opinion of the United States Court of Appeals for the District of Columbia pursuant to Local Rule 8(b) that were entered on May 13, 1985. Local Rule 8(b) forbids publication of a memorandum opinion issued under it. Nonetheless, the FEC published excerpts from the memorandum opinion, which it selected, in its official FEC RECORD of July, 1985, Vol. 11, Number 7, which goes out to most candidates and to those who

support candidates.[1] A petition for

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[1] There were other, more peripheral, reports and opinions below, growing out of the attempts of the petitioner Hopfmann to get the courts to heed the expediting mandates of the statutes. For this March, 1984, decision in the district court was over a year after petitioner/ appellant Hopfmann filed with the district court under 2 U.S.C.437g(a)(8)(A) on December 26, 1982, to appeal the dismissal of his administrative complaint and over a year after petitioner amended that complaint to add his allegations of unconstitutionality in the FECA as applied in this instance pursuant to 2 U.S.C. 437h on February 17, 1983. This delay was in the face of the mandate of 2 U.S.C. 437g(a)(10) as then in effect that all actions brought under the former subsection were to be "advanced on the docket of the court...and put ahead of all other actions" other than constitutional challenges brought under the latter section. Challenges pursuant to 2 U.S.C. 437h were to be certified "immediately" to the full panel of the court of appeals by 2 U.S.C. 437h(a) and, once there, according to 2 U.S.C. 437h(c), as then in force, it was the duty of that court (and this Court as well, under a 20 day appeal as a matter of right in the event of a negative decision in the court of appeals full panel) to advance the case on the docket and "expedite it to the greatest possible extent." Had these mandates been obeyed, this case would have been before this Court years ago. After reminders to the court in documents filed that statutory mandates for expedition

(Continued)

were unheeded, petitioner Hopfmann Moved to Expedite. Petitioner then filed for mandamus with the court of appeals on the same day that the district court granted the FEC summary judgment and dismissal, March 8, 1984. Pointing out that the language of 2 U.S.C. 437h is not discretionary, petitioner asked nonetheless that the mandamus request be heard. It was denied on July 10, 1984, along with several other motions of the petitioner requesting adherence to the language of 2 U.S.C. 437h. The court of appeals issued an Order saying the denial was without prejudice to the merits of any arguments appellant Hopfmann might propound during the ordinary course of the appeal and the denials were because the appeal afforded the appellant "'adequate means to attain the relief he desires,' Kerr v. United States, 426 U.S. 394, 403 (1976)(denying mandamus)." The appeals court, however, never did take up the question of the meaning of the language of 2 U.S.C. 437h mandating certification of all constitutional questions in the regular course of the appeal because it affirmed and echoed the holding of the district court interposing a doctrine of having a threshold power derived from the "frivolity" provision specifically stated in the In Forma Pauperis Statute, 28 U.S.C. 1915, as a preliminary finding which the courts must make with regard to the impoverished litigant, as expanded by the district court based on a line from footnote 14 of the opinion of this Court in California Medical Political Action Committee, 453 US 182, under which, despite this case's not being under that statute, the district court has the

rehearing was filed in a timely manner and was denied on July 19, 1985.

## AUTHORITY CONFERRING JURISDICTION FOR REVIEW BY THIS COURT

The jurisdiction of the Supreme Court is invoked under the United States Constitution, Art. III, Sec. 2, Cl. 2, and under the statutes 28 U.S.C. 1254 (1), and 28 U.S.C. 2101.

## CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS WHICH THE CASE INVOLVES

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(Continued)

authority to decide that constitutional questions raised pursuant to 2 USC 437h are "frivolous" in its eyes and do not have to be certified in accordance with the clear language of the statute. Accordingly, petitioner, still reading the statute to mean what it says and as not discretionary, petitioned this Court for a stay in the matter. This petition was denied on October 19, 1984, by the Chief Justice. It was referred to Madame Justice O'Connor on October 25, 1984, and was denied by the Court on November 5, 1984.

Art.I, Sec.4, Cl.1, the "Times, Places and Manner Clause;" Art.I, Sec.5, Cl.1; Art.I, Sec.7, Cl.1; Art.I, Sec.8, Cl.9; Art.II, Sec.1, Cl.1; Art.III, Sec.1; Art.III, Sec.2, Cl.1, "Case or Controversy Requirement"; Art.VI, Cl.2, "Supremacy Clause;" First Amendment; Fifth Amendment, Seventh Amendment; XIVth Amendment; XVIIth Amendment; Mass. Gen. Laws, Chpt. 53, Secs. 2,6,10,44, former Secs. 54, 54C and 54D; Chpt. 54, Secs. 28, 41; 1973 Mass. Acts c.439; The private rule passed by the inner group of the Massachusetts Democratic Party contained in its Party Charter adopted in 1982 and implemented to exclude petitioner from the ballot at a pre-primary convention repudiated by the legislature, is known as Massachusetts System. This rule is considered by the petitioner to be a private party rule with no force of law, but by the party insiders and officials who have enforced it is

claimed to be a "law" by virtue of the First Amendment freedom of association. This rule, and the question of whether or not it is a law, form much of the basis of the present controversy. 2 U.S.C. 431(1)(B), (8)(B) (ii), (iii), (iv), (v), (9)(B)(ii) and (iv); 432(f); 434(a) (1), (2)(A)(i), and (6)(A) and also (b); 437c(A)(1); 437d(a) (7) and (9) and (e); 437f; 437g(a)(1) through (3) and (4)(B)(1), (8),(9),(10), (12),(b); 437h, 441(d)(3)(a), (all as of 1982 and as continued thereafter; 28 U.S. C. 1915; 28 U.S.C. 1928; Text in appendix.

## STATEMENT OF THE CASE

There are two cases here, though one (the constitutional challenges to the FECA under 2 U.S.C. 437h) grows out of the other. Both cases arise from the administrative complaint filed by petitioner with the FEC against Senator Kennedy and his campaign committee in the 1982 senate race.

So it is important to understand the basis of that administrative complaint. In 1982 petitioner, long an active "Pro-Life" Democrat in Massachusetts, entered his party's primary race against Senator Kennedy. To that end he met every requirement of the state statutory scheme for ballot access, principally by collecting 10,000 registered voter signatures.

Despite having qualified under the statutes as written by the legislature, petitioner was not allowed on the ballot

for the statewide primary, held on September 14, 1982, by the state official in charge of ballots, Secretary of State Michael Joseph Connolly. Mr. Connolly stated that he was following a party rule, which requires candidates to attend a pre-primary convention of a small number of members of the party (1/4 of 1 percent) and get a percentage (15%) of their votes.

This Massachusetts System convention is not approved or authorized in the written statutes and the legislature had defeated 8 bills seeking to authorize such party pre-primary conventions. Previously, in 1973, the legislature had revoked authority for party pre-primary conventions, even conventions which only had the power to declare a party "endorsee." In 1982 the legislature passed a bill repudiating this unsanctioned convention scheme and reaffirming the statutory method of

nomination signatures as the sole method of ballot access.

However, the governor declined to sign the bill, deferring because the state's highest court's justices had just then issued an advisory opinion asserting primacy of party rulemaking under the First Amendment "Right of Association." An opinion from the state Attorney General was not yet available at the time when the bill would have had to be signed to be entered into the laws. The justices' opinion came under the state's statutes enabling such opinions on a carefully circumscribed, non-precedential basis. Clearly, under the established law of Massachusetts and other jurisdictions such opinions, are, of course, not law, but are merely the personal opinions of the jurists.

To expand on consideration of this advisory opinion, the justices of the

Supreme Judicial Court (SJC) opined as how a party inner group has a right under the freedom of association emanating from the First Amendment to the U.S. Constitution to add their own additional requirements for ballot access to those established by the legislature and that this right compelled a reinterpretation of state statutes to accomodate this right of association. The result was to enable creation of this unique Massachusetts System, where political parties make the election law directly.

The justices held that the state statutes must be found ambiguous and reinterpreted to make way for this newly asserted federal right. Further, they opined, continuing in their individual capacity, that the party rulemakers could actually "add" their additional rules for ballot access to the state statutes by virtue of this right of freedom of

association. In support of this innovative scheme of private lawmaking, the SJC justices cited this Court's opinions in Democratic Party of the U.S. v Wisconsin, 450 US 107 (1981) and Cousins v Wigoda. 419 US 477 (1975). The

Massachusetts System "jaybird"[2] convention

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2 In Terry v Adams, 345 US 461 (1953) this Court addressed the issue of party conventions that have no sanction in a state statutory scheme for ballot access but which nonetheless impose an additions, pre-selection for ballot access upon that which the legislature has embodied in the state statutory scheme. In that case an inner group of the Democratic Party of Fort Bend County, Texas, which called itself the Jaybird Association or Party held the unsanctioned pre-primary convention. Hence "jaybird" convention has become the term among students of this Court and its decisions for such a legislatively unsanctioned pre-primary convention that pre-selects candidates for the ballot. It is in that sense that we use the term in this brief, although it should be noted that the Jaybird Party apparently had the tacit approval and co-operation of the Texas legislature whereas here the opposition of the Massachusetts legislature to the Massachusetts "15 Percent Rule" Convention (Massachusetts Rule Convention or Massachusetts System) is clearly established on the record. Of course, in Terry this Court found that the purpose of the Jaybird Party Convention was to avoid the XVth amendment ban on racial discrimination in the public process of the primary election. But similarly here petitioner contends that the purpose of the Massachusetts Jaybird Convention is to avoid the mandate of the "Times, Places and Manner Clause," Art.I, Sec.4, Cl.1 as interpreted by the unanimous decision of this Court in Smiley v Holm, 285 US 355 (1932) (Opinion by Mr.

at which petitioner was excluded from the ballot for failure to get 15% of the votes of the party insiders, and which remains today the central feature of this Massachusetts System, was held May 21 and 22 of 1982.

On the 28th petitioner was excluded from the ballot.

On June 3 petitioner filed suit in the United States District Court in Boston seeking an order to be placed on the September ballot. It is acknowledged that petitioner never attempted to run a write-in campaign.[3]

Subsequently, as the September 14 primary approached, and as other attempts to seek remedies for the usurpation of the

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Chief Justice Hughes) and also the First and Fourteenth Amendments.

3 See the Brief For Appellee Federal Election Commission in the court below, p. 3, n.2: "Appellant Hopfmann...did not attempt a write-in campaign."

primary by this new Massachusetts System met with frustration, petitioner filed his administrative complaint with the FEC seeking to compel the treatment of the pre-primary convention as the "election" he believed it to be under the clear definition of 2 U.S.C. 431(1)(b). He attached to his complaint to the FEC, inter alia, a copy of the SJC advisory opinion which had been the justification for his exclusion from the ballot.

The FEC notified Senator Kennedy and his committee and their attorney answered stating that his clients had done no wrong in complying with the rule and that the Massachusetts System convention was not an election, because the "real" election was not until the official statewide primary September 14. However, Senator Kennedy was the only choice named on a primary ballot devoid even of a write-in blank.

The FEC then, without, it appears, any other inquiry[4] embraced the representations of the attorney for the parties complained about and dismissed the case. The report-opinion on which the dismissal rested made two assertions which petitioner has consistently attacked as error. First, the FEC asserted that under

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4 Indeed, the subsequent report of the district court's affirmance of this dismissal of the admininstrative complaint by summary judgment in CCH Federal Election Campaign Finance Guide, at paragraph 9203 headnoted the case with the statement: "The Federal Election Commission had adequate grounds for concluding that a violation did not occur when it considered the report of its General Counsel and the pertinent materials that a violation did not occur when it considered the report of its General Counsel and the pertinent materials he had provided along with it." It is clear from the record that the General Counsel relied in toto upon the response that he received from counsel for Kennedy and his committee. Had he read the SJC opinion provided by petitioner he would have known that the claim to be able to impose the Massachusetts system upon candidates was based on the First Amendment and not upon the state statutory scheme.

Massachusetts law candidates must attend the convention and get the delegate votes required by the party; and, secondly, that the Massachusetts System convention was not an election as defined in the statute because Mr. Hopfmann could have, had he so chosen, conducted a write-in candidacy.

For the first proposition the FEC cited Sec. 44 of Ch. 53 of the Mass. Gen. Laws, and for the second certain decisions of this Court, namely American Party of Texas v White, 415 US 767 (1974), and Democratic Party of U.S. v Wisconsin, 450 US 107 (1978).

These cases actually, of course, deal with the question of a state's power to make reasonable laws regulating ballot access and not with the "jaybird" type of situtation. There are decisions of this Court in which the question is addressed of a write-in possibility as an adequate alternative to ballot access. These cases

are mentioned below.

Petitioner appealed this dismissal by the FEC to the United States District Court for the District of Columbia. The central question is the question of whether or not the "jaybird" type of convention controlling ballot access in favor of party insiders, though not sanctioned by the legislature, is still, nonetheless, an election because it has been given authority by non-legislative officials to exclude candidates from the ballot.

The statutory definition is that a convention which has "authority" to nominate a candidate is an election.[5] In 1976, this language was adopted in a change from earlier language that had specified as an election a convention specifically conducted to nominate a

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5 2 U.S.C. 431(a)(2)

candidate. The change was made to eliminate (or, at least, to heavily penalize) the holding of conventions whose ostensible purpose was something else, but which wound up nominating candidates.

Petitioner argues that under the clear language of the statute, the Massachusetts System "jaybird" convention had the power to nominate, as conferred upon it by the justices of the SJC and by the Secretary of State.

These acts by the party insiders clearly eliminated Senator Kennedy's only opposition for the nomination.

Petitioner argues that all Advisory Opinions and other published statements of the FEC prior to the institution of this case consistently held that a convention which eliminated all but one candidate in a race was an election, unless the eliminated candidate did institute some kind of challenge procedure.

In short, petitioner argues that the language of the federal statute defining elections is clear and unambiguous (and as a matter of law is unambiguous) so as not to require any specialized expertise in interpretation, which the FEC's own prior pronouncements show. After all, it doesn't take the legal system's equivalent to a biochemical engineer to figure out whether party insiders are using a "smoke-filled room" to eliminate the influence of the rank and file on candidate selection, or whether these insider maneuverings are done with the sanction of quasi-official authority, however dubious that may be in terms of constituting valid law.

The FEC, on the other hand, argues for this specific case that just because the voters of Massachusetts are spared making a choice at the ensuing "real" primary, does not mean that the convention is an election. FEC maintains, Mr. Hopfmann

could have run a write-in campaign, even though they acknowledge that he did not. The Massachusetts System convention is merely a "winnowing out" process.

The FEC argues that its special expertise should be deferred to in intepreting its enabling statute, the FECA. FEC says that the Massachusetts System convention can be ignored, so that this case is analogous to the situation where a candidate is unopposed from the outset, but is nonetheless allowed a separate campaign contribution limit for that unopposed race. The reasoning of its prior Advisory Opinions supporting this position for unopposed races is that the unopposed candidate would be unable to maintain his public visibility vis-a-vis that of his general election opponent, if he is not allowed to "run" an unopposed campaign. The Massachusetts Republicans do not claim the power and have not

attempted use of this Massachusetts System "jaybird" convention to winnow out candidates; thus, Republican candidates have not risked penalty for participation in a nominating convention. So the reasoning may not apply.

Subsequently, the FEC gave an Advisory Opinion reinforcing its views in this regard in response to an inquiry concerning the campaign of one of Mr. Kennedy's fellow incumbents in the Massachusetts House delegation.[6] This opinion was pendente lite and illustrative of the FEC's penchant for using the Advisory Opinion power to make law, which they then seek to enforce upon people by their own devices.

The FEC and the lower court have not addressed the question of whether 2 U.S.C.

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6 FEC AO 1984-16, 1 Fed. Elec. Camp. Fin. Guide Par. 5758

431(a)(2) is clear and unambiguous in its language. The FEC has simply argued, and the lower courts have accepted, that the FEC's special expertise in the ways of party insiders must be applied as if the statute were ambiguous, avoiding the general rule that unambiguous statutes mean what they say.

In addition, the FEC has not acknowledged that the advisory opinion of the SJC, upon which it relied, states that Massachusetts law must defer to an untested reading of the federal Constitution in requiring that the candidates of the Democratic Party must attend this convention and get a percentage of these votes. Nowhere does the FEC acknowledge that this is an interpretation of a claimed right under the First Amendment to the U.S. Constitution.

Instead, the FEC and the lower courts have acted as if this radical claim has,

in fact, made the Massachusetts System a part of state law with no further questions in order. Though pressed by the petitioner as to why a federal agency, which claims expertise in election law matters, would appear to be sanctioning such a radical assertion of federal constitutional law as if the FEC were an appellate court, the FEC has refused to respond. Instead FEC has attacked the petitioner for troubling to raise the question.

Petitioner, in his second case, under the Buckley Provision, see Note 1, supra, which was filed at this point in the district court, attacked the FEC's use of its advisory opinion powers under the FECA as they affect this case, the sitting on the FEC (even as a non-voting member) of the Secretary of the body of which Mr. Kennedy is a powerful member and other things enabled by the FECA along with the

FECA provisions themselves.

The objections, almost without exception, raised by the petitioner in this second part of the action against the FECA had been raised before by a member of Congress, someone testifying before Congress, or by federal judges. None have been resolved.

Nonetheless, after the delay described in Note 1, during which the judge of the district court made it clear that he was not going to even have a conference in the case, the judge of that court, with it evident that mandamus was in the works, granted summary judgment to the FEC on the first case, the one turning on the statutory definition of election, rendering a memorandum opinion that was substantially of the position already taken by the FEC over a year before.

With regard to the challenges brought under the Buckley Provision, the court

treated them disdainfully and dismissed them based on the expansion of the "frivolity provision" of 28 U.S.C. previously discussed. In doing so, however, the court did discuss certain of them on the merits while ignoring others. It is because of this that petitioner now cites additional error in that the statute commands the immediate certification of "all" questions to the courts of appeals en banc panels, admittedly a provision intended to bypass the first two levels of the court of appeals and yet, the district court, while refusing the benefits of this provision, passed on the merits of part of petitioner's case itself.

From the March 8, 1984 summary judgment and dismissal by the district court the petitioner appealed to the court of appeals. The court of appeals, after denying the mandamus and motions as set out in Note 1, supra, set the matter for

oral argument and then changed its mind, apparently deciding that the petitioner and the issues he was raising were of little import. Subsequently the court issued an order and opinion echoing that of the lower court and, as we have noted, ordered the opinion not printed under Local Rule 8b in order that the FEC might circulate it in its own official publications, and particularly the FEC RECORD, excerpting to create its own selected version, without any of the disclaimers the rule commands. This avoidance of Local Rule 8(b) enabled the FEC to do the petitioner, a candidate struggling to emerge from the rank-and-file against one of the most powerful political organizations in the country, the gravest harm, making a mockery of the rule's ostensible purpose.7

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7 In this manner the court of

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appeals has managed to enhance and expand the very extralegal "lawmaking" on the part of the FEC which the petitioner attacks in these proceedings as being beyond what the Constitution allows. For Local Rule 8(b) is the appeals court's version of the advisory opinion power which the petitioner has attacked the misuse of throughout these proceedings and the related proceedings in the first circuit. Under this local rule, the appeals court claims the power to opine about matters in a way that it says is not precedential though it is binding law of the case and which it then orders not reported in the Federal Reporter. The petitioner challenges the use of this device under the particular circumstances of this case on general grounds. But, in particular, in this instance, since the FEC, one of the adversary parties to what is supposed to be a fair proceeding, then published excerpts of its own choosing from this memorandum opinion in its official RECORD, without any disclaimers to reflect the non-precedential nature of the opinion. Because its official RECORD is widely read by candidates for federal office, those who work with them regularly, and their financial supporters, in this way the FEC is able to give it the effect of precedent nonetheless, since the campaign finance community now is given the opinion as an official publication of the FEC without any disclaimer. And, without a reversal on the merits, of course, it does the maximum damage to Mr. Hopfmann as a candidate who desires to run again while the pious fiction of the opinion "not being reported" is preserved. such as the appeals court attached to its

Subsequently, in order presumably to make an example of petitioner for having raised these issues that had been raised in Congress and other places in the courts and having dared, as a would be candidate of the rank-and-file of his party, to challenge the power of the FEC, the court assessed him with over $ 3,000 in attorney's fees for the FEC lawyers.

Two new issues were raised at the court of appeals level. The first is the fundamental one of fairness and due process in the treatment that the courts themselves accorded petitioner, and the second is the question addressed in Note 7

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memorandum opinion, the effect is to send out the opinion in the light least favorable to the petitioner and his case to all those who follow election law and to all other candidates and those who are in the business of assisting candidates in a manner that actually assists and perpetuates, and even expands the very extralegal "lawmaking" by the FEC of which the petitioner complains.

above concerning the propriety of a local rule that establishes dangerous precedent through the auspices of the FEC.

With regard to the fundamental lack of fairness: The FEC was on several occasions granted extensions of time for filings beyond deadlines. The loss of time was substantial. Reasons were given, usually related to poor internal organization, such as people being on vacation and personnel turnover in the office.

The petitioner, on the other hand, missed one filing deadline, when his Rule 40(c) motion for the filing of the appendix after the FEC had answered was denied. This harrassment is almost unheard of in the U.S. Court of Appeals for the District of Columbia, where such motions have been granted as a matter of course for years. The court gave petitioner 10 days to file an appendix in three volumes. When this filing could

only be delivered two days late, and with a trivial nonconformance to appendix binding preference, the court imposed the additional burden of trying to use this situation to avoid hearing the case.

So petitioner now contends that these additional errors add to the fundamental deprivation of his First Amendment right to petition for the redress of grievances and due process and show an unwillingness on the part of the FEC and the court of appeals to adhere to common standards of justice and instead demonstrate, we respectfully submit, a willingness to punish the man who turns to the agency and the courts for redress.

## ARGUMENT

There is no sanction in the law for the idea that political parties have private lawmaking authority that entitles them to usurp the lawmaking functions of their

legislatures. State parties may make no change in election laws without specific delegation of authority from the legislatures to do so.

The making of laws regulating the times, places and manner of choosing candidates, including party nominees, is a state function, Smith v Allwright, 321 US 649 (1944); Marchioro v Chaney, 442 US 191 (1979) Though it may be delegated to parties, they may not usurp this state function, particularly to avoid a mandate of the Constitution, Terry v Adams, supra.

The state may delegate the resolution of intra-party disputes to the parties, but the state makes the rules by which the contest must be conducted. Storer v Brown, 415 US 27 (1974); Lubin v Panish, 415 US 709. Care must be taken not to confuse the interests of partisan organizations with governmental interests, Elrod v Burns, 427 US 347, 362.

Yet here FEC embraces the notion that a political party inner group, against the wishes of its own legislature and its own rank-and-file, can "add" laws to those made by the legislature. This case is twofold, brought under two separate statutory provisions. They both stem from the same acts by the FEC and lower courts. But all of the wrongs of which petitioner complains stem from the assault upon the election process by certain of the insiders of his own political party.[8]

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8 Hopfmann, et al. v Connolly, et al., 746 F2d 97 (1984); Hopfmann v Connolly, ___ US __, 105 SCt 2106 (1985) cert. acc. and lower court opinion vacated and remand; Hopfmann v Connolly, 769 F2d 24 (July, 1985). The FEC has noted that petitioner "has raised issues similar to some of those asserted here in a ballot access case brought in the United States District Court for Massachusetts. Hopfmann v. Connolly, No. 82-1530-MC (D. Mass., complaint filed June 4, 1982)." Brief for Appellee Federal Election Commission in the court below, p. 2. The case in the first circuit has paralleled this one in many respects. As here, there was considerable delay in the district

Their Massachusetts System "jaybird"

convention is directly at odds with the

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court and a somewhat patronizing attitude toward the petitioner and his audacity in seeking to enforce the Constitution and the laws. As here, the courts below in the first circuit claimed that the question of whether or not party inner groups have private lawmaking authority was answered in favor of such a claim as a matter of state law by this Court's decision in refusing cert in Langone v. Connolly, 103 SCt 1510 (1983). Here the FEC, like the federal courts in the first circuit, finds that as a matter of state law the state court has interpreted the claimed federal First Amendment right so that federal courts (or agencies acting as courts, such as the FEC) may not inquire into the matter. It will be interesting to see how the FEC now responds in light of this Court's unanimous acceptance of cert in the first circuit case on the first round and the vacation of the lower court opinion on which the FEC previously relied to the extent that, like the FEC, it relied upon Langone, supra. Now the FEC will have to either acknowledge that it was in error in claiming that the Massachusetts "jaybird" system is under state law or it will have to openly acknowledge that it is usurping the function of a federal appellate court by embracing a radical and heretofore unknown theory of constitutional jurisprudence not on the grounds that a state court has interpreted a state statute but rather on grounds that the First Amendment gives such a novel right.

manner which the legislature chose for ballot access as a matter of clear record. The legislature has for 50 years prescribed getting on the primary ballot by the "method of nomination papers," or by the the collection of voter signatures.

The legislature revoked authority for pre-primary conventions in 1973, after 11 years of trying them as an alternative method of ballot access, without disturbing the underlying method of nomination papers. These were endorsing conventions only, with no authority to impose additional conditions upon ballot access. The revoking statute was 1973 Mass. Acts c. 429. The legislature has since 1973 rejected 8 attempts to enact this Massachusetts System into law.

The language of the state statutory scheme is both clear and exclusive. Until the party insiders decided to advance this novel claim to private lawmaking authority

no one had suggested that there was any condition imposed upon ballot access other than those written in the statutes.

The Massachusetts System is thus in violation of the unanimous decision of this Court interpreting the Times, Places and Manner Clause in Smiley v Holm, 285 US 355.

In dismissing petitioner's complaint, the FEC stated unequivocally: "Under Massachusetts law, no candidate for a primary election will be placed upon the ballot who does not comply with the fifteen percent rule of the party." To support this contention the FEC then cited Mass. Gen. Laws Ann., ch. 53, Sec. 44 (West 1975). This section of Massachusetts law is reproduced in the appendix and contains nothing supporting, authorizing or delegating any sanction for the Massachusetts System.

However, proponents of this System have seized upon the holdings of this Court in Democratic Party of the U.S. v Wisconsin, supra, and Cousins v Wigoda, supra, and have extended these cases beyond what they will bear. Going beyond the notion that a national party rule about delegate selection may not be amenable to control by state laws that would require participation by non-party members in delegate selection, the Massachusetts System asserts a power to make laws and to treat as ambiguous the laws which had always been clear before.

If the FEC had done its research and analyzed the state statutes and had recognized the state statutory scheme, then it would have had to accept that the pre-primary convention at which the party rule was implemented was essentially illegal.

That would have also meant having to accept that one purpose of the Massachusetts System was to escape control of the Times, Places and Manner Clause in order to implement political bossism, just as the aim of the Jaybird Party Convention in Fort Bend County, Texas, was to escape the strictures of the XVth Amendment in order to implement racial segregation.[9]

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[9]Attempts such as the present one by the Massachusetts inner elite to seize candidate control are not unknown in American jurisprudence. But the modern primary system has now been with us so long that something like the Massachusetts system is not attempted as much as it once was. By 1953, when Terry, supra, was decided, Mr. Justice Frankfurter could remark: "Nor is this a case of boss-control, whether crudely or subtly exercised." He then spoke of "The right of all citizens to share in it, ['a process for primary elections'] and not to be excluded by unconstitutional bars." He should still be at Harvard to see the Massachusetts "jaybird" system. This was the same Felix Frankfurter who, in 1924, in a note in the Harvard Law Review, called advisory opinions "Ghosts that Slay."

This would then have forced the FEC to consider whether this convention was, in effect, an election for the Democratic nomination and whether the ensuing primary with only one man on the ballot was no longer meaningful.

Then Mr. Kennedy, as the only candidate surviving the convention, would have had to treat his nominating convention as an election. The question of the limits involving primary and general election differentiation would have appeared.

Title 28 Sec. 1652 does not in any way require the federal courts to defer to state courts on matters of interpretation of the United States Constitution. Quite the opposite: federal courts are required to make their own interpretations of the Constitution, and are the final arbiters of its meaning. So if the lower courts had done in this case what they are required by statute to do, then the state

statutory scheme as written would have been recognized as the binding rule of precedent. Private party rules would not have been recognized by the lower federal courts as part of Massachusetts law.

The FEC itself has long held that in analyzing complaints such as petitioner's, it must look to the state law governing candidate selection, not to private fiat.

Petitioner filed with his FEC complaint a copy of the SJC advisory opinion which Secretary of State Connolly relied upon in excluding him from the ballot. An examination of that opinion would have revealed that the party rule was not contained in the statutory scheme as written by the legislature but rather was claimed to be added to that scheme by the extension of the First Amendment freedom of association claimed by these justices and by the party insiders.

By failing to analyze accurately the actual state law at issue, by failing to regard it as a rule of decision as required by law, the lower courts departed substantially from the accepted and usual course of legal proceedings before the federal courts. The acceptance by FEC and both lower courts of the novel notion that political parties can "add" to state statutes and do so in defiance of their legislatures without delegation of such authority, is in direct conflict with the unanimous decision of this Court in Smiley v Holm, supra.

The FEC asserts that the possibility of a write-in candidacy is what prevents the unsanctioned pre-primary convention at issue here from being an election. It asserted, in its opinion dismissing Mr. Hopfmann's administrative complaint, that the ensuing months of campaigning by the only candidate named on the ballot were

not hollow procedures. In support of this contention they cited opinions by this Court such as American Party of Texas v White, supra.

This is misleading. The cases which the FEC cited do not deal with the question of whether the possibility of a write-in candidacy can convert an otherwise terminated primary election into one that is still going on. White, e.g., deals with the question of whether or not a state government can impose conditions upon primary ballot access that are necessary to keep the ballot and ballot access process orderly. No one quarrels with that contention and it is not at issue in Mr. Hopfmann's case.

What is at issue is whether the unexercised possibility of a write-in campaign can prevent the unsanctioned pre-primary convention from being one that had "authority to nominate" under 2 U.S.C. 431

(1)(B) because only one candidate emerged with access to the primary ballot.

The FEC said, and the lower courts echoed, that the write-in possibility was adequate access to the primary electoral process for petitioner as a candidate in lieu of the place on the primary ballot he qualified for under the statutory scheme. Because of this ongoing possibility, the FEC and the lower courts reasoned, the "election," under the FECA definition, continued beyond the convention. This flies in the face of what this Court has actually said on the subject.

In Lubin v Panish, supra, and after in McCarthy v Briscoe, 429 US 317, members of this Court made it clear that the possibility of a write-in is not an adequate substitute for ballot access. And so it cannot be, as the FEC has asserted and the courts have here upheld, that a write-in possibility can be the determinative

factor in converting a convention that would otherwise be an election into a non-election under the definition of 2 U.S.C. 431(1)(B). This only confirms what this Court held many years before in U.S. v Classic, 313 US 299, that a "write-in" possibility is not compensation for an improper burden upon ballot access.

Thus the FEC and the lower courts have decided a federal question, the adequacy of the possibility of write-in candidacy as a substitute for ballot access improperly denied, in conflict with the decisions of this court that apply.

We urge the Court to grant certiorari and make it clear that the possibility of a write-in candidacy is not sanctioned as adequate compensation for improperly exclusion from the ballot and that such a possibility by itself cannot change whether a nominating convention is an "election" under the definition of the

FECA. It would be dangerous to leave a precedent standing containing or affirming such an assertion on the part of the FEC

Nor is this assertion in line with the FEC's own position prior to the initiation of the present case. The FEC had consistently held that while unopposed elections could be "elections" under the statutory definition where the sole candidate had no opposition from the outset, in order to allow unopposed candidates in primaries to keep in the public eye along with the opposing party's candidates who would be actively campaigning during this period, elections in which there was opposition were over as soon as the winning candidates opposition was eliminated.

Thus, in the case of Connecticut's statutorily enacted 20 percent rule, for example, if only one candidate emerges from the convention then that convention

was held by the FEC to be "tantamount to an election" under 2 U.S.C. 431 (1)(B) unless some "challenge" is actually filed or mounted by an excluded candidate who did not get the 20 percent.[10]

True, the FEC subsequently did issue an advisory opinion attempting to justify its sudden switch in this case. But that was clearly a self-serving exercise pendente lite. This further illustrates FEC misuse of the Advisory Opinion

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10 AO 1975-54(CCH Fed. Elec. Camp. Fin. Guide Par. 5165; AO 1976-58(CCH FECFG Par. 5211); AO 1978-25(CCH FECFG Par. 5315; AO 1978-30 (CCH FECFG Par. 5325). The rule of the FEC itself prior to this case was that "There is a single contribution and expenditure limitation for the nominating process, regardless of whether the process includes a convention, primary or other procedure." We think it obvious that, in a democracy, if there is only one primary opponent for a powerful incumbent, once that single opponent is eliminated effectively, as by exclusion from the ballot when running against a powerfully entrenched political media-machine, the primary contest is over. To hold otherwise is to blink reality which this Court is not required to do.

mechanism, which the appellant assails in his constitutional challenges. It is arbitrary and capricious and abusive of discretion for the FEC to be allowed to make such a change of course.

Thirdly, an examination of the issues in the case does not leave much of a basis for contending that the convention did not have authority to nominate a candidate. In fact, it did nominate Senator Kennedy.

The statutory definition of 2 U.S.C. 431(1)(B) does not specify from whence the nominating authority must come. Here it came from the state committee chairman and the official in charge of ballot access. The simple fact that the authority is ultimately found to be not invalid does not make the authority any less effective for the statutory purpose at the time that it was exercised. To hold otherwise would encourage illegal and unconstitutional activity in order to evade FECA.

The language of the state statutory definition is clear and unambiguous. Indeed, it was changed from language that defined a convention "held to nominate" a candidate as an "election" t( the present language, which specifies a convention with "authority to nominate" as an election. The change can have been made for no other reason than to stop parties from holding conventions that nominally had some purpose other than nominating a candidate, but managed to do so. The FEC has obscured this clear definition by asserting that the possibility of a write-in campaign converts it to one that does not have authority to nominate. In contrast, it is manifestly the province of the courts to declare what the law is. Marbury v Madison, 2 US (1 LCranch) 60, 73.(Cranch 170); Allied Chemical & Alkali Workers v PPG Co., 404 US 157, 182.

Further, we think that undue deference to an administrative agency such as the FEC, which does not deal in an area of great technical expertise, such as FERC does, for example, is not warranted in this instance. The government ought not to seek to complicate matters which are so close to the American people and so readily comprehe. sible to them as the right to ballot access and to vote.

Next we turn to what is really the second case on which cert is being sought, the appellant Hopfmann's claims stemming from his challenge to provisions of the FECA under 2 U.S.C. 437h. There is some overlap in that his claims about improper usurpation of the congressional power to set the procedures for the inferior federal courts stem both from the failure on the part of the district court, which he alleges, to follow the mandate of 2 U.S.C. 437h regarding expedition, and the

failure which he alleges in the case of his appeal of the dismissal of his administrative complaint to follow the expediting requirement of 2 U.S.C. 437g.

2 U.S.C. 437h means what it says. It is both procedural and jurisdictional in its command. The lower courts, in this instance, have virtually stripped its command of meaning and made it clear that they will not obey its "bypass" of the first two levels of the normal procedural process of the federal courts. This establishes a dangerous precedent of courts acting on their own to alter, in effect, the wishes of Congress in regard to the procedure and jurisdiction of the inferior federal courts.

Some very old, and long-controlling precedents of this Court would be overturned, or at least threatened in this circuit by these decisions of the district and circuit courts being allowed to stand.

Wayman v Southard (1825) 23 US 1; Keary v Farmers and Merchants Bank (1842), 41 US 89; Railway Co. v Whitton's Adm'r (1872), 80 US 270 (Congress determines procedure for the courts) Jecker v Montgomery (1852), 54 US 498; Ex Parte McCardle (1869), 7 Wall 506, 514; Kline v Burke Constr. Co., 260 US 226 (1922) (Congress determines the jurisdiction of the inferior courts.) Such chipping away at the separation of powers upon which our form of government is based should not go unreviewed by this Court.

Further, the matter of the conflict between the opinion of this Court in Bread Political Action Committee v FEC, 455 US 577 (1982), wherein it was commanded that the clear language of the FECA should be adhered to unless there clearly appeared from the legislative history some reason for doing otherwise and the expansion of the in forma pauperis statute, 28 U.S.C.

1915, through footnote 14 in California Medical Association v FEC, 453 US 182, as interpreted by the FEC and lower courts in this instance should be resolved. The judicial activism of the courts of the D.C. circuit in this regard has created an asserted power on their part which appears to violate the constitutional scheme in its most basic tenet, the "separation of powers". This must be cleared up. Clearly Congress commanded the bypass of the first two levels of the system in this unusual provision.

There is a question of unjustified judicial activism in expanding the specific "frivolity provision" of the in forma pauperis statute through footnote 14 in California Medical to apply to the FECA, in which there is no such language, and to the petitioner, who is not proceeding in forma pauperis. Note 14 in California Medical refers principally to,

and relies upon, a district court case which applied specifically the in forma pauperis statute "frivolity provision" imposing a threshold "frivolity" test upon poor litigants. The other case cited in that footnote is cited "cf" not as being directly on point. This development of a footnote (which appears to be taken out of context) into a mandate that destroys the Buckley Provision must be examined by this Court. There is a conflict between the intepretation which the FEC and the lower courts in this instance have placed upon this footnote 14 in California Medical, and hence upon that case, and the unanimous, and more recent holding of this Court in Bread Political Action Committee wherein this Court stressed that the plain meaning of the language of 2 U.S.C. 437h must be adhered to unless there is legislative history that requires an interpretation that deviates from that

plain language.

The mandate that "all" constitutional questions raised about the FECA must be certified "immediately" to the full panel of the court of appeals sitting en banc would appear to mean what it says. And no legislative history to the contrary has been shown.

We turn to the substance of Mr. Hopfman's constitutional challenges to the FECA. They are questions which have previously been raised in congressional testimony, on the floor of Congress, or in other litigation, and still have not been answered. To attack Mr. Hopfmann for raising them appears to us to be an attempt by the FEC to prevent its enabling statute from undergoing precisely the kind of scrutiny that Congress intended its provisions to have when it enacted 2 U.S.C. 437h. The treatment of Mr. Hopfmann resembles the treatment accorded

the plaintiff in the New York case which led to Senator Buckley's desire to pursuade his colleagues to pass the provision which now bears his name.[11]

We have discussed above the FEC's assertion of judicial power in this instance, both in its use of advisory opinions and in its attempts to affirm holdings of the Massachusetts Supreme Judicial Court upon the Federal Constitution. In this it appears to be violating the "Separation of Powers" doctrine of the Constitution, the "case or controversy" requirement of Art.III, the requirement of Art.I,Sec. 5, Cl.1 that each house shall judge of the election of its members.

The challenge to the advisory opinion provisions of the FECA and to the non-

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11 Pichler v Jennings, (1972, SDNY) 347 F.Supp. 1061.

voting membership on the FEC of the Secretary of the Senate are two more of the constitutional challenges raised by the petitioner. It is hard to imagine two provisions of the FECA that are more in need of examination by this Court. At the time of the floor debate on the 1976 FECA Amendments, there were over a hundred instances already accumulated in which it appeared that the FEC had used the advisory opinion power to bypass the formal rulemaking proceeding mandated in federal law for administrative agencies.[12]

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12 S. 3065 of 1976, which became the 1976 Amendments, as reported out of committee, had a provision, crafted after lengthy hearings delving into the problems created by the AO's and the FEC's continued use of them to create general rules of law, that would have required the FEC, whenever it used the AO to create a general rule of law, as it had been doing then and has been doing since, to, within 30 days, adopt an actual rule or regulation incorporating the rule thus surreptitiously announced. This provision was defeated on the floor on grounds of procedural impracticality, but not before

Since Mr. Hopfmann commenced his case, we have witnessed the FEC in litigation use its advisory opinion power to challenge a 4-4 tie affirmance by this Court. Thus, an Advisory Opinion was erected into law in a manner to defy even the rulings of this Court, without the "case or controversy" required by the Constitution.

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(Continued)

it was made amply clear that there was a real constitutional problem. See Congr. Rec. Vol. 122, Part 6, 94th Congress, 2d Session, Mar. 16, 1976, p. 6693. See particularly Sen. Griffin's remarks that over 100 of the past AO's of the FEC had actually been rules or regulations. See also pages 6940-41-42-43. See particularly the testimony of Brice M. Claggett, Esq., who had been the lead attorney for plaintiffs in Buckley v Valeo, 424 US 1, (1976) which had just then struck down a good part of the FECA. Mr. Claggett pointed out with cogency the problem that was raised by the FECA's advisory opinion powers in that they resulted in general rules which were not necessarily laws at all but which left the party affected by them in a position as if they were law but without any way of challenging their illegality.

Further, we ask this Court to imagine what reaction there would be if the Congress should pass a law providing for a member of one of the judiciary committees to sit in ex officio on the deliberations of the members of this Court, without a vote, mind you, but sit in nonetheless. The fact of that individual's not having a vote would scarce make the matter any less a violation of the constitutional balance of powers. Yet that is just what Mr. Hopfmann challenges in the FECA, a violation of the separation of powers that is clear.

The complication that Mr. Hopfmann's complaint is against a long-term member of the very body which the ex officio member serves as an employee makes it all the clearer that this question is a serious one that needs to be examined.[13]

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13 Remarks of Antonin Scaglia,

The burdens that the FECA places upon a non-incumbent candidate injured by a violation of its provisions are so heavy, as this case illustrates, that the equal protection clause of the Fifth Amendment as contained in its requirement for due process is violated and the First Amendment right to petition for the redress of grievances is wrongfully taken from the injured party.

We submit that petitioner has raised questions that deserve consideration that they did not get. At the outset he raised a substantial question about whether the "Jaybird" type of pre-primary convention that a legislature rejects is an election under 2 U.S.C. 431 (1)(B). He proceeded

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(Continued)

Assistant Attorney General, on behalf of the Ford administration: Legislative History of the 1976 Amendments, p. 119 et seq., citing this Court's opinion in Weiner v U.S., 357 US 349, 355-356 (1958). See the remarks of the Hon. Walter Mondale, Senator from Minnesota.

to raise other substantial questions. The treatment he has received, and the precedents that the courts established in the offhand manner in which they treated his arguments, raise disturbing questions about our judicial system and its position among the three co-ordinate branches of the government and its treatment of those who dare to challenge an administrative agency which appears to have exceeded the bounds of constitutional authority. Where Congress has sought to give him an avenue for that challenge, he has met roadblocks.

For the foregoing reasons, the writ of certiorari should be granted in this case.

Respectfully submitted,

Laurence A. Elgin
2762 Woodley Place, N.W.
Counsel for Petitioner
202/ 628-1114

CERTIFICATE OF SERVICE
UNDER RULE 28

I hereby certify that I am a member of the bar of this Court, and that I have served, by hand, this 17th day of October, 1985, true and accurate copies of this Petition for the Writ of Certiorari, three in number, upon Charles N. Steele, Esq., General Counsel of the Federal Election Commission, 1325 K Street, N.W., Washington, D.C., and upon William Oldaker, Esquire, counsel for Edward M. Kennedy and the Committee to Re-elect Senator Kennedy, 1140 19th Street, N.W., Washington, D.C., upon the Honorable Edwin P. Meese, Attorney General of the United States, at the Main Justice Building, Department of Justice, Washington, D.C., 12th and Pennsylvania Ave., N.W., and upon the United States Attorney for the District of Columbia, United States Court House, 4th and Constitution Avenue, N.W., Washington, D.C.

_____

Laurence A. Elgin

85-659

Supreme Court, U.S.
FILED
OCT 17 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

ALWIN E. HOPFMANN,

Petitioner

v.

UNITED STATES FEDERAL ELECTION COMMISSION,
and
EDWARD M. KENNEDY,
and

THE COMMITTEE TO RE-ELECT SENATOR KENNEDY,

Respondents,

# PETITION TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Appendix

Laurence A. Elgin
2762 Woodley Place, N.W.
Washington, D.C. 20008
(202) 628-1114

BEST AVAILABLE COPY

FEDERAL ELECTION COMMISSION
1325 K Street, N.W.
Washington, D. C. 20463

EXPEDITED FIRST GENERAL COUNSEL'S REPORT

COMPLAINANT'S NAME: ALWIN E. HOPFMANN

RESPONDENTS' NAMES: SENATOR EDWARD M. KENNEDY AND THE COMMITTEE TO RE-ELECT SENATOR KENNEDY

INTERNAL REPORTS CHECKED: NONE

FEDERAL AGENCIES CHECKED; NONE

SUMMARY OF ALLEGATIONS

On September 13, 1982, Alwin Hopfmann filed a complaint alleging numerous violations by the respondents. Complainant's principle assertion is that the Massachusetts state Democratic Party's convention held during May 21-22, 1982, for the purpose of "endorsing candidates" should have been treated as the primary election. Complainant argues

that the Charter of the Democratic Party of Massachusetts which provides for the endorsement of a candidate who receives more than fifteen percent of the vote of the convention delegates[1] establishes a de facto nominating process which concludes whenever only one candidate emerges from the convention with at least fifteen percent of the vote. Under Massachusetts law, no candidate for a primary election will be placed upon the ballot who does not comply with the fifteen percent rule of the party. [2] In this instance, only Senator Kennedy emerged from the convention with at least

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1/ Charter of the Democratic Party of the Commonwealth of Massachusetts, Article Six, Section III, (adopted April 11, 1981).

2/ Mass. Gen. Laws Ann., ch. 53, Sec. 44 (West 1975).

fifteen percent of of the delegate votes for the Democratic Party's endorsement for Senate. Complainant rationalizes that since no other candidates were allowed to be placed on the ballot, the action taken by the Party's convention delegates amounted to mroe than a mere endorsement of Senator Kennedy's candidacy and was, in fact, a nomination.

If, as complainant urges, the convention completed the nomination process, Senator Kennedy's coimmittee violated numerous reporting requirements 3 as well as the contribution limitations.4/

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3/ 2 U.S.C. Sec. 434(a)(2)(A)(i), 434(a)(6)(A) and 434(b).

4/ This allegation is based upon the presumption that if the primary election occurred with the vote of the convention delegates on May 22, 1982, rather than on September 14, 1982, then

FACTUAL AND LEGAL ANALYSIS

Article 6, Section III of the Charter of the Democratic Party of Massachusetts which is entitled "Endorsing Candidates" provides:

> There shall be a State convention in even-numbered years for the purpose of endorsing candidates for statewise offices in those years in whichg such office is to be filled. Endorsements for statewide office of enrolled Democrats nominated by the Convention shall be by majority vote of the delegates present and voting, with the proviso that any nominee who receives at least 15 percent of the Convention vote on any ballot for a particular vote may challenge the Convention endorsement in the State Primary Election.

Chapter 53, Section 44 of the

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all contributions received subsequent toMay 22, 1982, would count against the general election limitations to the extent that they were not designated to retire primary campaign debts.

Massachusetts General Laws provides, in pertinent part, that "[t]he nomination of candidates for nomination at state primaries shall be by nomination papers." On April 5, 1982, Massachusetts Governor King had before him Massachusetts House Bill No. 5852 which, if approved by him would have added an additional sentence following the first sentence of Chapter 53, Section 44, supra, stating "[n]otwithstanding any aprty charter, rule or by-law, any candidate submitting nomination papers pursuant to this chapter shall be a candidate for nomination at the state primary." Clearly, the effect of this Bill would have been to allow candidates, in addition to those who had received at least 15 percent of the convention vote, to challenge the convention's endorsement on the primary

election ballot. Due to constitutional questions perceived by the Governor int he effect of the proposed legislation, he requested, and received, an Advisory Opinion from the Supreme Judicial Court of Massachusetts. Opinion of the Justices, 385 Mass. 1201 (1982).

Two questions were put before the court:

1. does the fifteen percent rule in the Democratic Charter supersede the current provision of the General Law, Chapter 53, Section 44, or can a candidate be placed on the Democratic State Primary Ballot by nomination papers without having received fifteen percent of the vote at the party convention?

2. Would enactment of H. 5852 allow a candidate to be placed on the

Democraic State Primary Ballot by nomination papers without having received fifteen percent of the vote at the party convention?

The Court declined to render an opinion to question one due to the lack of a "solemn occasion authorizing [the court] to answer" (the standard utilized by the Massachusetts Court for rendering Advisory Opinions).

As to the second question, the Court concluded that "[i]f House No. 5852 were approved, G.L. c. 53, Sec. 44, as thereby amended, would abridge the constitutional rights of the Democratic Party and its members to associate by allowing candidates to be placed on the state primary ballot in contravention of the party's charter." Governor King declined to sign the Bill after having received this

Opinion.

Complainant asserts, then, that the Democratic Party's Charter is given the full effect of state law, and because no other candidate at the convention received at least fifteen percent of the convention vote for the endorsement for the party's nominationfor the U.S. Senate seat, the nomination effectively occurred with that vote by the convention delegates. Complainant has attempted to draw a parallel between the situation in Massachusetts and that in Connecticut. In that regard, he points to the analysis set forth in Advisory Opinion 1976-58.

There, the party had adopted a twenty percent rule for convention voting. The state's statute provided that whenever only one candidate received at least twenty percent of the convention

vote "no primary shall be held by such party for such office and the party--endorsed candidate for such office shall be deemed (emphasis added) to have been lawfully chosen as the nominee of such party for such office." Massachusetts, on the other hand, is not so restrictive. The primary election contest in Massachusetts does not in any circumstances terminate with the vote of the party's convention delegates. Massachusetts still holds a primary election. Certification that a candidate is his or her party's nominee must await the results of the primary contest. The contest is not a hollow procedure because the Massachusetts General Laws provide

for write-in campaigns.5/ In the present case, therefore, although Senator Kennedy was the only Senate candidate to emerge from the convention with at least fifteen percent of the votre, he still was not the Democraic Party's nominee. The powers provided the convention by the Democratic Charter do not include the power to nominate candidates; it may merely endorse a candidate. Until the voters spoke at the polls in September, there was no Democratic Party nominee for the United States Senate from Massachusetts. There was, until the balloting was completed, a possibility that a

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5/ "A person whose name is not printed on a state primary ballot as a candidate for an office, but who receives sufficient votes to nominate him therefore" and who accepts the nomination shall be placed on the ballot for the ensuing election. Mass. Gen. Laws Ann., ch. 53, Sec. 3 (West 1975).

write-in campaign could be mounted to effectively challenge the action of the convention which endorsed Senator Kennedy. 6/ Because the convention is merely a "winnowing-out" process and does not under any circumstances result in the nomination of a candidate until after the primary election is held, the convention

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6/ The United States Supreme Court has recognized the interests of the state in limiting the number of persons on the ballot in order to avoid voter confusion, American Party of Texas v. White, 415 U.S. 767 (1974), and the associational rights of a political party to determine who will appear on a general election ballot as the candidate of that party, Democratic Party of U.S. v. Wisconsin, 450 U.S. 107 (1978). Although teh Massachusetts Democratic Party has not chosen to nominate a candidate at the convention, it has chosen to reduce the number of candidates who may appear as having its endorsement in the primary election. The state's acquiesence in this process would appear to furtner the interests of the state as well as the associational rights of the party.

should not be considered as an election for purposes of the Federal Election Campaign Act of 1971, as amended. 7/

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7/ Indeed, in AO 1978-79, the Commission considered the effect of Louisiana's statute which provided for the termination of the general election process where a candidate, in an open primary contest, received a majority of the vote in the primary. Because the state did not certify that candidate as the winner of the general election until after the scheduled date of the general election, the Commission concluded that the candidate could, although unopposed, still qualify for separate contribution limitations. In addition, the Commission has previuslynoted that the question of whether a party convention is an "election" with "authority to nominate a candidate" turns on an analysis of state law regarding the power and role of such a convention in the nomination of candidates for Federaloffice. See also Advisory Opinion 1976-58 (Connecticut statute providing that no primary shall be held when only one candidate receives at least twenty percent of the vote; "the 'endorsed candidate' ... shall be deemed to have been lawfully chosen as the nominee of such party for such office."); AO 1978-25 (Colorado and Minnesota's political conventions are not elections since they "do not have authority under state law to nominate candidates ...");

Accordingly, the General Counsel recommends that the Commission determine that there is no reason to believe that Senator Edward M. Kennedy or the Committee to Re-Elect Senator Kennedy violated 2 U.S.C. Secs. 434(a)(2)(A)(i), 434(a)(6)(A), 434(b) or 441a(f).

Recommendation - MUR 1468(82)

1. Find no reason to believe that respondents Senator Edward M. Kennedy or the Committee to Re-Elect Senator Kennedy violated 2 U.S.C. 434(a)(2)(A)(i), 434(a)(6)(A), 434(b) or 441a(f).

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and AO 1978-30 (Utah's party primary convention was held to be an election due to a statutory provision which stated that whenever one candidate receives at least seventy percent of the votes cast "he shall become the party's candidate in the next general election without the necessity of running in the primary election.")

2. Approve the attached letters to Alwin E. Hopfmann, Senator Kennedy, and the Committee to Re-Elect Senator Kennedy.

3. Close the file.

Charles N. Steele
General Counsel

By: Kenneth A. Gross
Associate General Counsel

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALWIN E. HOPFMANN,

Plaintiff

v.

FEDERAL ELECTION COMMISSION,
et al.,

Defendants

Civil Action No. 82-3667

MEMORANDUM OPINION

Plaintiff, Alwin E. Hopfmann seeks review of the Federal Election Commission's ("Commission" or "FEC") dismissal of his administrative complaint alleging that Senator Edward Kennedy and the Committee to Re-Elect Senator Kennedy ("Committee") violated provisions of the Federal Election Campaign Act ("FECA" or "Act") relating to reporting requirements

and contribution limitations. 2 U.S.C. Secs. 434(a), (b), and 441(f). Plaintiff's request for review presents two issues: whether the FEC decision is "contrary to law"; whether plaintiff's constitutional challenges merit certification to the United States Court of Appeals.[1] For the following reasons, this Court affirms the FEC decision, finding that it was proper and correct, and declines to certify plaintiff's constitutional challenges to the United States Court of Appeals.

Plaintiff Hopfmann was a participant in the Massachusetts Democratic Party's pre-primary convention held in May, 1982. Among its purposes, the convention

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[1] The two relevant provisions of the statute are discussed infra at pages 5 and 7.

was to endorse those candidates who received at least 15% of the votes from party delegates. Under Massachusetts law, only those candidates with 15% support from their party can be placed on the ballot fro the primary election. Mass. Gen. Laws Ann., Ch. 53, Sec. 44 (West 1975). The incumbent Senator Kennedy was the sole candidate to receive 15% of the convention votes, consequently, only his name was placed on the ballot for the September 1982 primary election.

Plaintiff filed a complaint with the Federal Election Commission in September 1982, asserting that the earlier convention of May satisfied the criteria of an "election" as defined in the Act, and therefore Senator Kennedy and the Committee violated certain reporting

requirements of the Act pertaining to elections. Section 431(1)(B) of the Act defines "election" as follows:

> The term "election" means ... a convention or caucus of a political party which has authority to nominate a candidate.

(emphasis added). Plaintiff claimed that since the convention vote resulted in the exclusive endorsement of Senator Kennedy (and consequently only his name appeared on the September primary election ballot), the convention in fact had authority to nominate a candidate and thus was an "election" under the Act.

Numerous motions have been filed by both parties in this case,[3] and the

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[3] The FEC moved to dismiss for lack of jurisdiction, insufficiency of process and failure to prosecute. The Court denies this motion finding that the complaint was timely filed, and that defendant has failed to show that the relatively brief delay in service of

plaintiff has chosen an unusual series of motions to advance his complaint against the FEC.[4] In this opinion the Court addresses defendant's motion for summary judgment regarding the FEC decision, and defendant's motion to dismiss plaintiff's

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process would justify dismissal. See, e.g., Prudential Lines, Inc. v. Marine Repair Services, Inc., 94 F.R.D. 325 (E.D.N.Y. 1982).

[4] A number of plaintiff's motions are not germane to the central issues, nor are they based on any coherent legal theory. For example, plaintiff's motion of May 31, 1983 for "Continuancce Until Discovery Can be Completed" is completely inappropriate because this Court's review under section 437g is based on the record before the Commission at the time it made its decision. Discovery is likewise inappropriate to determine the merits of plaintiff's constitutional challenges.

Plaintiff's motion of July 26, 1983, requesting leave to add certain additional parties, and of July 29, 2983, requesting clarification of what constitutes the "pleadings" under the statute, also lack merit.

constitutional challenges.

A.

First, this Court considers plaintiff's challenge to the dismissal of his complaint. The standard of review is explained in section 437(a)(8)(C):

> (T)he court may declare that dismissal of the complaint ... is contrary to law, and may direct the Commission to conform with such declaration within 30 days, failing which thge complainant may bring ... a civil action to remedy the violation involved in the original complaint. The primary election contest in Massachusetts does not in any circumstances terminate with the vote of the party's convention delegates. Massachusetts still holds a primary election. Certification that a candidate is his or her party's nominee must await the results of the primary contest. The contest is not a hollow procedure because the Massachusetts General Laws provide for write-in campaigns.

Report at 5. He further explained that although Senator Kennedy was the only

candidate to receive the convention's endorsement for the primary election, "until the voters spoke at the polls in September, there was no Democratic Party nominee for the U.S. Senate from Massachusetts." Id. at 6. Thus, because the convention did not satisfy the criteria of an "election" under the Act, the General Counsel concluded that Senator Kennedy and the Committee had not violated the Act's reporting requirements.

This Court finds that the decision of the FEC dismissing plaintiff's complaint was reasonable in light of the General Counsel's report. Furthermore, the plaintiff's arguments challenging the Commission's decision are without merit. Plaintiff asserts that the FEC has given no reason for its decision, but that is

not true. The General Counsel's Report adequately sets out the reasons upon which the FEC's decision is based. Furthermore, it is apparent that plaintiff's contentions were considered, and that the FEC's decision is consistent with its previous decisions. For the foregoing reasons, this Court finds that the FEC's decision was "sufficiently reasonable" to merit this Court's deference.

B.

The plaintiff's request for certification of his constitutional challenges is brought under Sec. 437h of the Act which provides:

> (A)ny individual eligible to vote in any election for the office of President ... may institute such actions in the appropriate [federal] district court ..., including actions for declaratory judgment, as

> may be appropriate to construe the constitutionality of any provision of the Act. The district court immediately shall certify all questions of constitutionality ... to the court of appeals for the [federal] circuit involved.

Plaintiff argues that this provision requires the Court to certify his constitutional challenges to the United States Court of Appeals without regard to the merit of his claims. However, in California Medical Assn. v Federal Election Commission, 453 U.S. 182, 193-194 n. 14 (1981), the Supreme Court plainly stated, "(W)e do not construe Sec. 437h to require certification of constitutional claims that are frivolous ... " (citing Gifford v. Congress, 452 F.Supp. 802 (E.D. Ca. 1978)). Furthermore, in Mott v. Federal Election Commission, 494 F. Supp. 131, 134

(D.D.C. 1980), the court found that review of a complaint to determine whether it presents a ripe and substantial controversy is appropriate before certifying questions purusant to Sec.-437h.

After careful consideration, this Court concludes that plaintiff's challenges do not raise substantial constitutional questions, are frivolous and are not based on any coherent legal theory. He asserts a wide range of challenges to the Act: (1) that it violates Article I of the Constitution and the Seventeenth Amendment by regulating the times, places, and manner of holding elections for United States senators; (2) abridges plaintiff's rights to due process by not affording him a full hearing before the FEC; (3) denies plaintiff equal protec-

tion of the laws by protecting the incumbent politician; (4) violates the "case or controversy" requirement of the Constitution by allowing the Commission to rely on earlier FEC advisory opinions in its decision making process; (5) violates the First Amendment because the Act prevents an individual who is a losing candidate in a political election from petitioning for redress in the courts; (6) violates the Seventh Amendment by denying plaintiff a jury trial on his complaint.

Plaintiff's allegations that the FEC has violated Article I of the Constitution and the seventeenth Amendment are groundless. The fact is that the state of Massachusetts determines the time, place and manner of its elections, not the FEC. Plaintiff has thus failed in

his attempt to convince thi8s Court that the FEC has violated the doctrine of separation of powers or the Seventeenth Amendment by finding that the Massachusetts Democratic Convention was not an "election" under the Act. Similarly, plaintiff's due process challenge must fall because he claims the right to an adversarial proceeding when in fact the FEC proceedings do not determine an individual's individual legal rights. See Hannah v. Larche, 363 U.S. 420, 441-42 (1980). Also plaintiff's arguments alleging that he has been denied equal protection of the laws is without merit. Beyond a bare assertion, he provides no factual basis for his allegations that the FEC's decision was intended to "protect the incumbent." Furthermore, this type of equal protec-

tion claim previously has been rejected by the Supreme Court. See Buckley v. Valeo, 424 U.S. 1, 96 (1976).

His complaint about the FEC's use of advisory opinions is meritless and overlooks the fact that the United States Court of Appeals for the District of Columbia has approved the use of such opinions insomuch as they contribute to consistency in the administrative process. See Martin Tractor Co., v. Federal Election Commission, 627 F.2d 375, 384 (D.C. Cir. 1980), cert denied sub nom. National Chamber Alliance for Politics v. Federal Election Commission, 449 U.S. 954 (1980). Likewise, plaintiff's First Amendment claim is frivolous because the FECA provides for judicial review under Sec. 437g(a)(8)(C), and for certification of constitutional claims

under Sec. 437h, to facilitate access to the courts, not to prevent it. Finally, plaintiff's claim under the Seventh Amendment is without merit under Lehman v. Nakshian, 453 U.S. 156 (1981). There the Supreme Court stated that a "plaintif in an action against the United States has a right to trial by jury only where Congress has affirmatively and unambiguously granted that right by statute." Id. at 168 (emphasis added). The FECA does not provide for jury trials and thus the plaintiff's Seventh Amendment challenge must fail.

## CONCLUSION

For the reasons set out above, the plaintiff's request for review and judicial relief by this Court are denied. An appropriate order dismissing

the complaint will be entered.

March 8, 1984

Barrington D. Parker

United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-1317

ALWIN E. HOPFMANN, Plaintiff,

v.

U.S. FEDERAL ELECTION COMMISSION,
Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Before: EDWARDS, SCALIA, and STARR,
Circuit Judges

JUDGMENT

This case was reviewed on the record on appeal from the United States District Court for the District of Columbia and was briefed by counsel for the parties. The court has accorded full consideration to the issues presented and concludes the the appeal occasions no need for a published opinion. See D.C. Cir. R. 11-

(d), 13(c). For the reasons stated in the accompanying memorandum, it is

ORDERED and ADJUDGED, by this court, that the judgment from which this appeal has been taken is affirmed; and, it is

FURTHER ORDERED, by this court, that appellee's (FEC) motion for reasonable attorneys' fees and costs is granted, with the fees and costs to be fixed by a separate order. Appellee (FEC) will file with the clerk within 30 days a memorandum, listing fees and costs supported by affidavits and other appropriate materials.

It is ORDERED, by this court, on its own motion, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See Local Rule 14, as amended on November 30,

1981, and June 15, 1982. This instruction to the Clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

Per Curiam
FOR THE COURT

GEORGE A. FISHER
Clerk

No. 84-5207 Hopfmann v. U.S. Federal Election Commission, et al.

MEMORANDUM

Per Curiam: This is an appeal from the District Court's dismissal of Alwin E. Hopfmann's complaint against the Federal Election Commission (FEC). Mr. Hopfmann's claims stem from the adopption by the Democratic Party of Massachusetts, in 1982, of a "fifteen percent rule," by which a candidate for United States Senator who did not receive fifteen percent of the vote at the state

Democratic Convention would not be placed on the primary election ballot. Mr. Hopfmann sought to be Massachusetts' Democratic candidate for United States Senator in 1982. He did not, however, receive the requisite fifteen percent of the votes at the 1982 state convention. Accordingly, Mr. Hopfmann's name was not placed on the ballot. Only Senator Edward Kennedy received the requisite number of convention votes.

Appellant subsequently filed a complaint with the FEC, contending that the 1982 state convention constituted an "election" within the meaning of 2 U.S.C. Sec. 431(1)(B). Based upon that legal premise, appellant advanced the claim that Senator Kennedy had violated the reporting provisions of the Federal Election Campaign Act of 1971. Mr. Hopf-

mann further claimed that the state procedures by which Senator Kennedy was nominated were unconstitutional.

The FEC dismissed Mr. Hopfmann's complaint. Mr. Hopfmann then filed the instant action in the United States District Court for the District of Columbia, which dismissed his complaint on March 8, 1984. This appeal followed.

We conclude that Mr. Hopfmann's claims are without merit. The FEC has consistently held that in order for a convention to constitute an "election" under 2 U.S.C. 431(1)(B), the convention must actually nominate a candidate, rather than, more limitedly, narrow the field of candidates on the primary ballot. The FEC's interpretation contradicts neither the statutory language nor the legislative history, and

represents a reasonable and permissible agency construction. Inasmuch as write-in candidates were permitted by state law in the 1982 Massachusetts primary, Senator Kennedy did not secure the Democratic nomination until he won the party's primary. In consequence, the Massachusetts Democratic Convention of 1982 was not an "election" under thge Federal Election Campaign Act.

As to Mr. Hopfmann's constitutional claims, it is not within the FEC's province to determine whether Massachusetts' primary system satisfies the federal Constitution. That is a claim that Mr. Hopfmann must make, if at all, to the courts; we take note in this respect of an adverse decision in litigation brought by Mr. Hopfmann

claiming that the Massachusetts system was unconstitutional. Hopfmann v. Connolly, 746 F.2d 97 (1st Cir. 1984).

Quite apart from the merits, we would conclude in any event that the appeal should properly be dismissed in view of appellant's failure to comply with orders of this court. Under our order entered on May 14, 1984, appellant's brief and joint appendix were required to be filed by June 25, 2984. Although appellant timely filed his brief, he failed to file the joint appendix in accordance with the timetable established by the May 14, 1984 order. He also failed to respond to two written inquiries from counsel to the FEC in advance of the June 25, 2984 deadline with respect to serving a designation of appendix on the Commission. On June 22,

1984, appellant filed a motion to defer filing of the appendix. This court denied the motion on July 23, 1984 and ordered appellant to designate with specificity the documents to be included in the joint appendix within ten days of the order. The order further directed that the appendix was to be filed on or before August 20, 1984. Appellant again failed to comply with that order.

The Commission moved to dismiss this appeal on August 24, 1984, prompting appellant to file a memorandum of opposition filled with invective and scurrilous comments. Other than utterly inappropriate bombast, the opposition made two points: namely that the delay was not significant and that dismissal of the appeal would be "harsh remedy." The undisputed fact remains, however, that

appellant failed to comply with two orders of the court and failed to advance any substantial justification for his failure. As a result, dismissal would be appropriate under Fed. R. App.P.3(a). Notwithstanding this, and in view of the completion of the briefing cvycle and our having considered the merits of this case, we conclude that the appeal is in any event utterly without merit and thus affirm the judgment of the District court. We firmly admonish counsel for appellant to refrain in any future filings in this court from engaging in unprofessional, inappropriate comments and outrageous name-calling. Vigorous argumentation for one's position is one thing; ad hominem attacks are quite another. Any future instance will not be countenanced.

In addition, we find that this appeal was so meritless as to be frivolous. Not only was the appellant's statutory argument unsupported by law, but appellant also chose to make many constitutional claims, all of which were patently without merit. "Appellate courts are burdened by a heavy volume of business and the problem is needlessly aggravated when frivolous appeals are taken." Furbee v. Vantage Press, Inc., 464 F.2d 835, 837 (D.C. Cir. 1972). Therefore, under Fed. R. App. P. 38 and 28 U.S.C. Sec.1912, we grant the FEC's motion for reasonable attorneys' fees and costs. See Furbee, 464 F.2d at 837; Seagull Mfg. Co. v. NLRB, 735 F.2d 971 (6th Cir. 1984); United States v. Potamkin Cadillac Corp., 689 F.2d 379, 382 (2d Cir. 1982). The FEC will file

with the clerk within 30 days a memorandum, supported by affidavits and other appropriate materials. The fees and costs will be fixed by a separate order.

UNITED STATES COURT OF APPEALS
For the District of Columbia

No. 84-5144 September Term 1983

In Re: CA 82-03667

Alwin E. Hopfmann,
Petitioner

No. 84-5207

Alwin E. Hopfmann,
Appellant

v.

United States Federal
Election Commission, et al

Before: Tamm, Edwards and Starr,
Circuit Judges

O R D E R

Upon consideration of appellant's several motions requesting that his appeal be heard by the Court en banc either immediately or expeditiously, appellant's petition for a writ of prohibition and/or mandamus and appellee's opposition, it is

ORDERED, by the Court, that appellant's motions be denied. Appellant has failed to demonstrate as a threshold matter that the district court erred when it declined to certify appellant's constitutional challenges pursuant to 2 U.S.C. Sec. 437h (1982). See California Medical Association v. FEC, 453 U.S. 182. 193-94 n. 14 (1981) ("[W]e do not construe Sec. 437h to require certification of constitutional claims that are frivolous . . .). See also Martin Tractor v. FEC, 627 F.2d 375 (D.C. Cir.), aff'g 460 F. Supp. 1017 (D.D.C. 1978), cert. denied, 449 U.S. 954 (1980), aff'd mem. sub nom. National Conservative Political Action Committee v. FEC, 627 F.2d 896 (D.C. Cir. 1981). Appellant's other motions seeking expedited en banc consideration pursuant to Rule 27 of the

Federal Rules of Appellate Procedure and D.C. Cir. R.6 lack merit and are therefore denied. Moreover, we do not view appellant's submissions as a proper application for initial hearing en banc pursuant to Fed. R. App. P. 35. Denial of these motions is without prejudice to the merits of any arguments appellant may propound during the ordinary course of this appeal. Finally, because this appeal affords appellant "adequate means to attain the relief he desire," Kerr v. United States, 426 U.S. 394, 403 (1976) (denying mandamus), it is

FURTHER ORDERED, by the Court, that appellant's petition for issuance of a writ of mandamus and/or prohibition be denied. See also In re Chicago, Rock Island & Pacific Ry., 225 U.S. 273 (1921) (denying prohibition).

Per Curiam

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D.C. 20543

October 19, 1984

Laurence A. Elgin, Esq.
2762 Woodley Place, NW
Washington, DC 20008

RE: Alwin E. Hopfmann v. United States Federal Election Commission, et al.
No. A-272

Dear Mr. Elgin:

Your application for a stay in the above-entitled case has been presented to the Chief Justice, who has endorsed thereon the following:

"Denied
WEB
10/19/84."

Very truly yours,

ALEXANDER L. STEVAS, Clerk

By

Francis J. Lorson

Chief Deputy Clerk

gtb

cc: Hon. Rex E. Lee, Solicitor General

OPINION OF THE JUSTICES TO THE GOVERNOR, Supreme Judicial Court of Massachusetts. April 23, 1982. 385 Mass. 1201.

A question was propounded by the Governor of the Commonwealth of Massachusetts to the Justices of the Supreme Judicial Court with respect to the nomination of party candidates for placement on the state primary ballot. The Justices of the Supreme Judicial Court, gave answer that proposed mandatory statute providing that "Notwithstanding the charter, rule or by-law of a political party, any candidate, who is enrolled in such political party, submitting nomination papers subject to the provisions of this chapter shall be a candidate for nomination of the state primary" would abridge the constitutional rights of the party and its members to

associate while allowing candidates to be placed on the state primary ballot in contravention of the party's charter.

Question answered.

On April 23, 1982, the Justices submitted the following answers to questions propounded to them by the Governor.

To His Excellency, the Governor of the Commonwealth of Massachusetts:

The Justices of the Supreme Judicial Court respectfully respond to the question set forth in the Governor's request dated April 5, 1982, and transmitted to the Justices on April 6, 1982.

General Laws c. 53, § 44, as amended through St. 1981, c. 278, § 1, provides in part that "(t)he nomination of candidates for nomination at State primaries shall be by nomination papers." There is pending before the Governor for his approval

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House Bill No. 5852, which would amend c.53, § 44, by inserting after the first sentence the following sentence: "Notwithstanding the charter, rule or by-law of a political party, any candidate, who is enrolled in such political party, submitting nomination papers subject to the provisions of this chapter shall be a candidate for nomination at the state primary." Article Six, Section III, of the charter of the Democratic party of the Commonwealth of Massachusetts, provides "There shall be a State Convention in even-numbered years for the purpose of endorsing candidates for statewide offices in those years in which such office is to be filled. Endorsements for statewide office of enrolled Democrats nominated at the Convention shall be by majority vote of the delegates present and voting, with the

proviso that any nominee who receives at least 15 percent of the Convention vote on any ballot for a particular office may challenge the Convention endorsement in a State Primary Election."

Stating his uncertainty "as to the necessity or constitutionality of H.5852 if enacted into law," the Governor requests, pursuant to the authority contained in Pt. II, c.3, art. 2, of the Massachusetts Constitution, as amended by art. 85 of the Articles of Amendment, the opinion of this court on the following questions of law:

> "1. Does the fifteen percent rule in the Democratic Charter supersede the current provisions of General Law, Chapter 53, Section 44, or can a candidate be placed on the Democratic State Primary Ballot by nomination papers without having received fifteen percent of

the vote at the party convention?

"2. Would enactment of H.5852 allow a candidate to be placed on the Democratic State Primary Ballot by nomination papers without having received fifteen percent of the vote at the party convention?"

The constitutional provision which empowers us to answer questions propounded by the Governor, the Council, and the Legislature, restricts our authority to "important questions of law" and to "solemn occasions." Part II, c. 1, § 1, art. 2 of the Massachusetts Constitution. To preserve the principle of separation of powers, fundamental in our system of government, we are bound strictly to observe these constitutional limitations. Answer of the Justices, 362 Mass. 914, 916-917, 291 N.E. 2d 598 (1973). As the Justices have ad-

vised, "By a solemn occasion the Constitution means some serious and unusual exigency. It has been held to be such an exigency when the Governor or either branch of the Legislature having some action in view has serious doubt as to their power and authority to take such action, under the Constitution, or under existing statutes." Answer of the Justices, 373 Mass. 867, 871, 366 N.E. 2d 730 (1977), quoting from Answer of the Justices, 148 Mass. 623,625-626, 21 N.E. 439 (1889).

(1) Because question number 1 inquires only about the legal effect of the current statute in light of the Democratic party charter, and not about the Governor's authority to take action, there is no solemn occasion authorizing us to answer. Opinion of the Justices, ___ Mass. ___, ___ - ___, Mass.Adv. Sh.

(1981) 1361, 1381-1382, 424 N.E. 2d 1092. It may well be that the Justices' answer to question number 1 would help the Governor determine the "necessity" of House No. 5852 in view of the present statute, a concern expressed in the request. However, whether the bill is necessary raises the question whether it is wise or expedient for the Governor to approve the bill. The Justices are not empowered to answer questions bearing on the wisdom or expediency of proposed legislation. Answer of the Justices, 319 Mass. 731, 734, 66 N.E. 2d 358 (1946). Opinion of the Justices, 314 Mass 767, 771-772, 49 N.E. 2d 252 (1943). Not having the authority to answer question number 1, we respectfully request that we be excused from answering it.

In the context of the Governor's expressed uncertainty as to the constitutionality of House No. 5852, we interpret question number 2 to inquire whether, if House No. 5852 were approved, G.L. c. 53, § 44, as thereby amended, would abridge the constitutional rights of the Democratic party and its members to associate by allowing candidates to be placed on the Democratic State primary ballot in contravention of the party's charter. The Governor has a present duty to act on House No. 5852. Part II, c. 1 § 1, art. 2, of the Massachusetts Constitution. This duty, and the Governor's expressed doubt about whether House No. 5852 would be constitutional if he approved it, present a solemn occasion requiring our answer to the second question. See Opinion of the Justices, 314 Mass. 767, 772, 49 N.E. 2d

252 (1943)

"The (Democratic Party of the Commonwealth) and its adherents enjoy a constitutionally protected right of political association. 'There can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of "orderly group activity" protected by the First and Fourteenth Amendments ... . The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom.' Kusper v. Pontikes, 414 U.S. 51, 56-57, 94 S.Ct. 303, 307, 38 L.Ed.2d 260 (1973). 'And of course this freedom protected against federal encroachment by the First Amendment is entitled under the Fourteenth Amendment to the same protection from infringement by the States.' Williams v.

Rhodes, 393 U.S. 23, 30-31, 89 S.Ct. 5, 10-11, 21 L.Ed. 2d 24 (1968). Moreover, '(a)ny interference with the freedom of a party is simultaneously an interference with the freedom of its adherents.' Sweezy v. New Hampshire, 354 U.S. 234, 250, 77 S. Ct. 1203, 1211, 1 L.Ed.2d 1311 (1957); see NAACP v. Button, 371 U.S. 415, 431, 83 S. Ct. 328, 337, 9 L.Ed.2d 405 (1963)." Cousins v.Wigoda, 419 U.S. 477, 487-488, 95 S.Ct. 541, 547, 42 L.Ed.2d 595 (1975). "Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being." Democratic Party of U.S. v. Wisconsin, 450 U.S. 107, 122n22, 101 S.Ct. 1010, 1019, 67 L.Ed.2d 82 (1981), quoting L. Tribe, American Constitutional Law 791

(1978). A determination of who will appear on a general election ballot as the candidate endorsed by an identified political party is a critical decision for that party. The party, therefore, has a substantial interest, implicit in its freedom of association, to ensure that party members have an effective role in that decision. Democratic Party of U.S. v. Wisconsin, supra.

Within the Commonwealth, the winner by a plurality of a party primary becomes that party's candidate for statewide office in the general election. G.L. c 53, § 2. Voting in party primaries is limited to enrolled party members and unenrolled voters who enroll at the polls just before receiving ballots. G.L. c. 53, § 37. Apart from Article Six, Section III, of the State Democratic party charter, in order to be placed on a party's primary

ballot, a candidate for statewide office must be an enrolled member of that party, G.L. c. 53, § 48, and submit nominating papers signed by at least 10,000 registered voters, c. 53, § 44, who may be enrolled in that party or unenrolled. G.L. c. 53, § 46. Therefore, apart from Article Six, section III, of the State Democratic party charter, a candidate for statewide election could be placed on the Democratic party ballot and win the primary, thus becoming entitled to be placed on the general election ballot as the Democratic party candidate, with little or no support from the regular party membership.[1/]

---

1/ As of February, 1980, 39.9% of all registered voters in the Commonwealth were unenrolled. Bachrach v. Secretary of the Commonwealth, ___ Mass. ___, ____, Mass.Adv.Sh.(1981) at 97 415 N.E.2d 832.

The State Democratic party charter, Article Six, Section III, proviso that any nominee who receives at least 15% of the vote at the State convention may challenge the convention endorsement, by negative implication adds to the statutory requirement of nomination papers for placement on the primary ballot the further requirement that a candidate must receive at least fifteen percent of the convention vote. This has the double effect of limiting the number of candidates on the primary ballot, thereby eliminating the confusion that may result from too many candidates, and of limiting the candidates to those with significant party support, thereby giving the party members an effective role in choosing the party's candidate in the general election. The State has been held to have a compelling

interest in limiting the number of candidates in order to prevent voter confusion. American Party of Texas v. White, 415 U.S. 767, 780-781, 94 S.Ct. 1296, 1305-06, 39 L.Ed.2d 744 (1974). Storer v. Brown, 415 U.S. 724, 732, 94 S.Ct. 1274, 1280, 39 L.Ed. 2d 714 (1974). A political party has a parallel interest.

If House No. 5852 were approved, G.L. c. 53, § 44, as thereby amended, would appear to override the charter requirement of 15% of the convention vote for placement on the primary ballot and, together with c. 53, § 46, would eliminate the Democratic party's control of who its candidate in the general election would be. This would substantially infringe the right of freedom of association of the Democratic party and its members, and therefore, to pass constitutional

muster, it must serve a compelling State interest, Sears v. Secretary of the Commonwealth, 369 Mass. 392, 397, 341 N.E. 2d 264 (1975), and do so with as little infringement on constitutional rights as possible. See Riddell v. National Democratic Party, 508 F.2d 770, 776-778 (5th Cir. 1975). We must apply "strict scrutiny" to its justification and operation. Bachrach v. Secretary of the Commonwealth, ___ Mass. ___, ___, Mass.Adv.Sh. (1981) 93, 101, 415 N.E.2d 832.

The Commonwealth unquestionably has a compelling interest in the overall regularity of the election process, including limitation of the number of candidates on the ballot so as to avoid voter confusion and ensuring that the candidates whose names appear on the ballot have significant community support.

American Party of Texas v. White, 415 U.S. 767, 782, 94 S.Ct. 1296, 1306, 39 L.Ed.2d 744 (1974). This applies to the conduct of primary elections, Kusper v. Pontikes, 414 U.S. 51, 94 S.Ct. 303, 38 L.Ed.2d 260 (1973), Rosario v. Rockefeller, 410 U.S. 752, 93 S.Ct. 1245, 36 L.Ed.2d L (1973), which are an important part of the procedure by which the ultimate office holder is chosen. Sears v. Secretary of the Commonwealth, supra, 369 Mass. at 398, 341 N.E.2d 264. These interests are served by the requirement that each candidate for statewide office obtain the signatures of at least 10,000 registered voters on nomination papers, G.L. c. 53, § 44, but they are not served by the elimination of a 15% convention vote requirement for placement on the primary ballot. Elimination of the Democratic party charter

requirement could only increase the number of candidates on the primary ballot, with a resulting increased potential for voter confusion.

We assume that House No. 5852 was designed to promote the integrity of the election process. Nevertheless, the Commonwealth's compelling interest in the integrity of the election process does not constitutionally justify elimination of party control over who the party's candidate in the general election will be. This view finds support in Democratic Party of U.S. v. Wisconsin, supra. In that case, the United States Supreme Court struck down a State statute that compelled the party to seat delegates at its national convention who were bound by the statute to vote on the first ballot with the results of a primary election in which any

registered voter could participate regardless of party affiliation. This was contrary to the national party rules. Wisconsin impermissibly attempted to override the national party's attempt to limit "those who could participate in the processes leading to the selection of delegates to their National Convention." Id. 450 U.S. at 122, 101 S.Ct. at 1019. General Laws c. 53, § 44, as it would be amended by House No. 5852, would attempt to override the State Democratic party's effort to ensure that regular party members have a substantial voice in the selection of its candidates for statewide office, and that, at least in conjunction with §§ 44, 46, and 37 of G.L. c. 53, is impermissible. If the law of the Commonwealth were to require that nomination papers be signed only by regular members

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of the party, contrary to c. 53, § 46, or that only regular members of the party may vote in the primary, contrary to c. 53, § 44, as it would be amended by House No. 5852, would be less intrusive on a political party's constitutional rights. However, we express no opinion on whether it would be sufficiently less intrusive to be constitutionally sound, since that is not the question before us, nor need we consider whether any proviso of the Constitution of the Commonwealth might prohibit the proposed enactment.

(2) We answer question number 2, as interpreted by us above, as follows: If House No. 5852 were approved, G.L. c. 53, § 44, as thereby amended, would abridge the constitutional rights of the Democratic party and its members to associate by allowing candidates to be placed on the

Democratic State primary ballot in contravention of the party's charter.

The foregoing opinion is submitted by the Chief Justice and the Associate Justices subscribing hereto on the 23rd day of April, 1982.

EDWARD F. HENNESSEY

HERBERT P. WILKINS

PAUL J. LIACOS

RUTH I. ABRAMS

JOSEPH R. NOLAN

NEIL L. LYNCH

FRANCIS P. O'CONNOR

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 84-5207 September Term 1984

Alwin E. Hopfmann, Civil Action 82-03667

Appellant

v.

United States Federal

Election Commission,

et al.

Before: WILKEY*, WALD and STARR

Circuit Judges

O R D E R

Upon consideration of appellee's (FEC) motion to dismiss appeal and to award costs and attorneys' fees, and of the opposition thereto, it is

ORDERED, by the Court, that appellee's (FEC) motion to dismiss is referred for disposition to the panel of judges that will be assigned to hear and

consider this case on the merits; and, it is

FURTHER ORDERED, by the Court, that appellee's motion to award costs and attorneys' fees is dismissed without prejudice to renewal after final disposition of this appeal.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER

Clerk

*Circuit Judge Wilkey did not participate in the making of this order

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 84-5207 September Term, 1984

Alwin E. Hopfmann, CA 82-03667

Appellant

v.

United States Federal

Election Commission,

et al.

O R D E R

Upon consideration of the record, the briefs and all of the pleadings and proceedings had herein, and it appearing that the above case falls within the intent and purpose of Rule 11(d) of the General Rules of this Court, and also meets one or more of the criteria set forth in that Rule, it is

ORDERED, by the Court, that the

above case presently scheduled for May 7, 1985, will be considered and decided without oral argument.

Parties will be notified at a later date of the division of the Court considering this matter.

For the Court:

George A. Fisher, Clerk

By: Patricia L. Chatman

Deputy Clerk

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 84-5207 September Term, 1984

Alwin E. Hopfmann, Civil Action 82-03667

Appellant

v.

United States Federal

Election Commission,

et al.

O R D E R

Upon consideration for appellant's motion for leave to file a motion to defer preparation and filing of an additional portion of the appendix, and of appellee's motion to extend time to file brief, it is

ORDERED that the Clerk is directed to file appellant's motion to defer appendix pursuant to FRAP 30(c) and

appellant's motion to defer appendix pursuant to FRAP 30(c) is granted and the Clerk is further directed to file the appendix (Vols. I, II, III), and it is

FURTHER ORDERED that the following briefing schedule is established:

Appellee's brief November 30, 1984

Appellant's reply brief, if any December 14, 1984

The Clerk shall include this case in the pool of cases available for selection on this Court's February, 1985 callendar.

FOR THE COURT:

GEORGE A. FISHER

Clerk

UNITED STATES COURT OF APPEALS

For the District of Columbia District

No. 84-5207 September Term, 1983

Alwin E. Hopfmann, Civil Action 82-03667

Appellant

v.

United States Federal

Election Commission,

et al.

Before: WRIGHT, Acting Chief Judge

O R D E R

Upon consideration of appellant Hopfmann's motion for leave to file a deferred appendix, of appellees' motion for leave to file out of time their opposition thereto, and of appellees' lodged opposition, and it appearing that appellant's counsel has not taken the customary steps to assure the preparation of an appropriate appendix, it is

ORDERED, by the Court, that appellees' motion for leave to file an opposition to the pending motion out of time is granted and the Clerk is directed to file appellees' lodged opposition; and it is

FURTHER ORDERED, by the Court, that appellant Hopfmann's motion for leave to file a deferred appendix is denied. Appellant is directed to designate, within ten days fromt he date of this order, and with specificity, the documents he intends to include in the appendix, and to afford appellees ten days within which to serve a counter designation. Appellant shall file the appendix on or before August 20, 1984; and, it is

FURTHER ORDERED, by the Court, that the briefing schedule herein is revised as follows:

Appellees' brief September 19, 1984

Appellant's reply October 3, 1984
brief, if any

The Clerk shall retain this case in the pool of cases available for selection on the Court's November-December, 1984 calendar.

Per Curiam

FOR THE COURT

GEORGE A. FISHER

Clerk

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 84-5207 September Term, 1984

Alwin E. Hopfmann CA No. 82-03667

v.

Federal Election Commission, et al.

BEFORE; Edwards, Scalia and Starr,

Circuit Judges

O R D E R

Upon consideration of this Court's judgment of May 13, 1985, and of the memorandum of the Federal Election Commission for costs and attorneys' fees, it is

ORDERED, by the Court, that costs and attorneys' fees in the amount of $3,578.90 are awarded to the Commission and taxed against Alwin E. Hopfmann.

The Clerk is directed to transmit a certified copy of this order to the

District Court.

Per Curiam

FOR THE COURT,

GEORGE A. FISHER, CLERK

BY: Robert A. Bonner

Chief Deputy Clerk

## CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS WHICH THE CASE INVOLVES

Constitutional Provisions:

Art.I, Sec.4, Cl.1, the "Times, Places and Manner Clause:

"The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Place of chusing Senators."

Art.I, Sec. 5, Cl.1:

"Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members,..."

Art.I, Sec.6, Cl.2:

"and no Person holding any Office under the United States, shall be a member of either House during his Continuance in Office."

Art.I, Sec.8, Cl.9:

"The Congress shall have Power...to constitute tribunals inferior to the Supreme Court."

Art.II, Sec.1, Cl.1:

"The executive Power shall be vested in a President of the United States of America."

Art.II, Sec.1, Cl.:

"Before he [the President] enter on the Execution of his Office, he shall take

the following Oath or Affirmation:---'I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.'"

Art.III, Sec.1:

"The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

Art.III, Sec.2, Cl.1, "case or controversy":

"The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States,.."

Art.III, Sec.2, Cl.2:

"In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

Art.VI, Cl. 2, The "Supremacy Clause":

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, and Thing in the Constitution or

Laws of any State to the Contrary notwithstanding."

First Amendment:

"Congress shall make no law ...abridging...the right of the people...to petition the government for the redress of grievances."

Fifth Amendment:

"No person shall...be deprived of life, liberty, or property, without due process of law"

Seventh Amendment:

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Fourteenth Amendment:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, whithout due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

...

"But when the right to vote at any election for the choice of...the Executive and Judicial Officers of a state,...is denied to any of the male inhabitants of such Stte, being twenty-one years of age,

and citizens of the United States, or in any way abaaridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to th whole numbver of male citizens twenty-one years of age in such State."

Seventeenth Amendment:

"The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof,... The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures."

Mass. Gen. Laws, Chpt. 53:
(Annotated Laws of Massachusetts, Lawyers' Co-op Authorized Edition)

"NOMINATION OF CANDIDATES

...

"Section 2. Nominations. How Made

"...candidates of political parties for all elective offices...shall be nominated...in primaries or caucuses....No candidates shall be nominated, and no member of a political committee or convention delegate in any other manner than is provided in this chapter....

...

"Editorial Note--

...

"The 1973 amendment struck out the exception for pre-primary conventions of political parties."

"PROVISIONS APPLYING TO ALL PRIMARIES

"Section 34. Ballots, Substance, Arrangement and Form.

...

"Except where vacancies caused by death, withdrawal of[sic] physical disability are filled, no names shall be printed on a ballot other than those presented on nomination papers.

...

"Immediately following the names of candidates on ballots at state and presidential primaries, where there are fewer names than there are persons to be chosen, blank spaces shall be provided, equal in number to the deficiency, for the insertion of other names.

...

"Editorial Note--

...

"The 1973 amendment rewrote this section, eliminating provisions relating to candidates endorsed for nomination at state conventions.

...

"PROVISIONS APPLYING TO STATE PRIMARIES.

...

"Section 41. Nominations at State Primaries; Sections Applicable.

"Primaries shall be held for the nomination of candidates of a political party for all offices to be filled at a state election, except presidential elector. Sections forty-two to fifty-three A, inclusive, shall apply to such primaries.

...

"Section 44. Nomination Papers. Number of Signatures.

"The nomination of candidates for nomination at state primaries shall be by

nomination papers. In the case of...United States senator, nomination papers shall be signed in the aggregate by at least ten thousand voters;...

...

"Editorial Note--

...

"The 1973 amendment struck from the first sentence the provision that nomination may be by endorsement for nomination at a state convention, and from the second sentence struck an exception "as hereinafter provided".

...

"PROVISIONS APPLYING TO PRE-PRIMARY CONVENTIONS.

...

"Section 54. [Repealed by 1973, 429, Section 5]

"Section 54A-54B. [Repealed, 1939, 473, Section 20.]

"Section 54C, 54D. [Repealed, 1973, 429, Section 5.]

...

Mass. Gen. Laws, Chpt. 54

...

"PREPARATION AND FORM OF BALLOTS.

...

"Section 41. Ballots, Names, Residences and Political Designations of Candidates.

"Ballots for the use of voters in a voting precinct, polling place or town shall contain the names of all candidates duly nominated for election therein, and, except as provided in section forty-three, they shall contain the names of no other person."

Massachusetts Acts, 1973 --Chap.429

"AN ACT REPEALING THE LAW PROVIDING FOR PRE-PRIMARY CONVENTIONS OF POLITICAL PARTIES.

"Be it enacted, etc. as follows:

...

"Section 2A. The first sentence of section 2 of chapter 53 of the General Laws, as most recently amended by section 1 of chapter 407 of the acts of 1966, is hereby amended by striking out, in lines 3 and 4, the words "and except as provided in section fifty-four.

...

"Section 4. Section 44 of said chapter 53 is hereby amended by striking out the first and second sentences and inserting in place therof the following two sentences:--

"The nomination of candidates for nomination at state primaries shall be by nomination papers. In the case of offices to be filled by all the voters of the commonwealth, nomination papers shall be signed in the aggregate by at least ten thousand voters.

"Section 5. Sections fifty-four, fifty-four C and fifty-four D of said chapter fifty-three are hereby repealed."

Article 6, Section III of the Charter of the Democratic Party of Massachusetts (1979), "The 15 Percent Rule":

"There shall be a State convention in even-numbered years for the purpose of endorsing candidates for statewide offices in those years in which such office is to be filled. Endorsements for statewide office of enrolled Democrats nominated by

the Convention shall be by majority vote of the delegates present and voting, with the proviso that any nominee who receives at least 15 percent of the vote on any ballot for a particular vote may challenge the Convention endorsement in the State Primary Election."

2 U.S.C. 431(1)(B):

"When used in this Act: (1) The term 'election' means--...(B) a convention or caucus of a political party which has authority to nominate a candidate."

2 U.S.C. 431(8)(B)(ii),(iii),(iv),and (v):

"The term "contribution" does not include--

...

(ii) the use of real or personal property, including a church or community room used on a regular basis by members of a community for noncommercial purposes, and the cost of invitations, food, and beverages, voluntarily provided by an individual to any candidate or any political committee of a political party in rendering voluntary personal services on the individual's residential premises or in the church or community room for candidate-related or political party-related activities, to the extent that the cumulative value of such invitations, food, and beverages provided by such individual on behalf of any single candidate does not exceed $1,000 with respect to any single election, and on behalf of all political committees of a political party does not exceed $2,000 in any calendar year.

(iii) the sale of any food or beverage by a vendor for use in any candidate's campaign or for use by or on behalf of any political committee of a politicalparty at a charge less than the normal comparable charge, if such charge is at least equal to the cost of such food or bevarage to the vendor, to the extent that the cumulative value of such activity by such vendor on behalf of any single candidate does not exceed $1,000 with repect to any single election, and on behalf of all political committees of a political party does not exceed $2,000 in any calendar year.

(iv) any unreimbursed payment for travel expenses made by any individual on behalf of any candidate or any political committee of a political party, to the extent that the cumulative value of such activity by such individual on behalf of any single candidate does not exceed $1,000 with respect to any single election, and on behalf of all political committees of a political party does not exceed $2,000 in any calendar year.

(v) the payment by a State or local committee of a political party of the costs of preparation, display, or mailing or other distribution incurred by such committee with respect to a printed slate card or sample ballot,or other printed listing, of 3 or more candidates for any public office which is held in the State in which such committee is organized, except that this clause shall not apply to any cost incurred by such committee with respect to a display of any such listing made on broadcasting stations, or in newspapers, magazines, or similar types of

general public political advertising
...
(9)(B) The term 'expenditure' does not include--
(iii) any communication by any membership organization or corporation to its members, stockholders, or executiveor adminisrative personnel, if such membership organization or corporation is not organized primarily for the purpose of influencing the nomination for election, or election, of any individual to Federal office, except that the costs incurred by a membership organization (including a labor organization) or by a corporation directly attributable to a communication expressly advocating the election or defeat of a clearly identified candidate (other than a communication primarily devoted to subjects other than the express advocacy of the election or defeat of a clearly identified candidate), shall, if such costs exceed $2,000 for any election, be reported to the Commmission in accordance with section 304(a)(4)(A)(i), and in acordance with section 304(a)(4)(A)(ii) with respect to any general election."

2 U.S.C. 432(f)(2)"

"Each principal campaign committee shall receive all designations, statements, and reports required to be filed with it under paragraph (1) and shall compile and file such designations, statements, and reports in accordance with this Act."

2 U.S.C. 434(a)(1):

"Each treasurer of a political committee shall file reports of receipts and disbursements in accordance with the provisions of this subsection. The treasurer shall sign each such report.

...

(2)(A)(i):

"a pre-election report, which shall be filed no later than the 12th day before (or posted by registered or certified mail no later than the 15th day before) any election in which such candidate is seeking election, or nomination for election, and which shall be complete as of the 20th day before such election.

...

(6)(A):

"The principal campaign committee of a candidate shall notify the Clerk, the Secretary, or the Commission, and the Secretary of State, as appropriate, in writing, of any contribution of $1,000 or more received by any authorized committee of such candidate after the 20th day, but more than 48 hours before, any election. This notification shall be made within 48 hours after the receipt of such contribution and shall include the name of the candidate and the office sought by the candidate, the identification of the contributor, and the date of receipt and amount of the contribution'"

2 U.S.C. 437c(A)(1):

"There is established a commission to be known as the Federal Election Commission. The Commission is composed of the Secretary of the Senate and the Clerk of the House of Representatives or their designees, ex officio and without the right to vote, and 6 members appointed by

the President, by and with the advice and consent of the Senate. No more than 3 members of the Commission appointed under this paragraph may be affiliated with the same political party."

2 U.S.C. 437d(a)(7):

"(a) The Commission has the power--

...

(7) to render advisory opinions under section 308 of this Act;

...

(9) to conduct investigations and hearings expeditiously, to encourage voluntary compliance, and to report apparent violations to the appropriate law enforcement authorities.

...

(e) Except as provided in section 309(a)(8) of this Act, the power of the Commission to initiate civil actions under subsection (a)(6) of this section shall be the exclusive civil remedy for the enforcement of the provisions of this Act."

2 U.S.C. 437f:

"(a)(1) Not later than 60 days after the Commission receives from a person a complete written request concerning the application of this Act, chapter 95 or chapter 96 of the Internal Revenue Code of 1954, or a rule or regulation prescribed by the Commission, with respect to a specific transaction or activity by the person, the Commission shall render a written advisory opinion relating to such transaction or activity to the person.

(2) If an advisory opinion is requested by a candidate, or any

authorized committee of such candidate, during the 60 day period before any election for Federal office involving the requesting party, the Commission shall render a written advisory opinion relating to such request no later than 20 days after the Commission receives a complete written request.

(b) Any rule of law which is not stated in this Act or in chapter 95 or cahpter 96 of the Internal Revenue Code of 1954 may be initially proposed by the Commission only as a rule or regulation pursuant to procedures established in section 311(d). No opinion of an advisory nature may be issued by the Commission or any of its employees except in accordance with the provisions of this section.

(c)(1) Any advisory opinion rendered by the Commission under subsectin (a) may be relied upon by--

(A) any person involved in the specific transaction or activity with respect to which such advisory opinion is rendered; and

(B) any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which such advisory opinion is rendered.

(2) Notwithstanding any other provisions of law, any person who relies upon any provision or finding of an advisory opinion in accordance with the provisions of paragraph (1) and who acts in good faith in accordance with the provisions and findings of such advisory opinion shall not, as a result of any such act, be subject to any sanction provided by this

Act or by chapter 95 or chapter 96 of the Internal Revenue Code of 1954.
(d) The Commission shall make public any request made under subsection (a) for an advisory opinion. Before renering an advisory opinion, the Commission shall accept written comments submitted by any interested party within the 10-day period following the date the request is made public."

2 U.S.C. 437g(a)(1),(2),(3) [1982-1983]:

(a)(1) Any person who believes a violation of this Act or of chapter 95 or chapter 96 of the Internal Revenue Code of 1954 has occurred, may file a complaint with the Commission. Such complaint shall be in writing, signed and sworn to by the person filing such complaint, shall be notarized, and shall be made under penalty of perjury and subject to the provisions of section 1001 of title 18, United States Code. Within 5 days after receipt of a complaint, the Commision shall notify, in writing, any person alleged in the complaint to have committed such a violation. Before the Commission conducts any vote on the complaint, other than a votd to dismiss, any person so notified shall have the opportunity to demonstrate, in writing, to the Commission within 15 days after notification that no action should be taken against such person on the basis of the complaint of a person whose identity is not disclosed to the Commission.
(2) If the Commission, upon receiving a complaint under paragraph (10 or on the basis of informaion ascertained in the normal course of carrying out its supervisory responsibilities, determines,

by an affirmative vote of 4 of its members, that it ahs reason to believe that a person has committed or is about to commit, a violation of this Act or chapter 95 or chapter 96 of the INternal Revenue Code of 1954, the Commission shall, through its charman or vice charman, notify the person of the alleged violation. Such notification shall set forth the factual basis for such alleged violation. The Commission shall make an investigation of such alleged vioilation, which may include a field investigation or audit, in accordance with the provisions of this section.

(3) The general counsel of the Commission shall notify the respondent of any recommendation to the Commission by the general counsel to proceed to a vote on probable cause pursuant to paragraph (4)(A)(1). With such notification, the general counsel shall include a brief stating the position of the general counsel on the legal and factual issues of the case. Within 15 days of receipt of such brief, respondent may submit a brief stating the position of such respondent on such legal and factual issues of the case, and replying to the brief of general counsel. Such briefs shall be filed with the Secretary of the Commission and shall be considered by the Commission before proceeding under paragraph (4).

...

(4)(B)(i) No action by the Commission or any person, and no information derived, in connection with any conciliation attempt by the Commission under subparagraph (A) may be made public by the Commission without the written consent of the respondent and the Commission.

...

(8)(A) Any party aggrieved by an order of the Commission dismissing a complaint filed by such party under paragraph (1), or by a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia.

(B) Any petition under subparagraph (A) shall be filed, in the case of a dismissal of a complaint by the Commission, within 60 days after the date of the dismissal.

(C) In any proceeding under this paragraph the court may declare that the dismissal of the complaint or the failure to act is contrary to law, and may direct the Commission to conform with such declaration within 30 days, failing which the complainant may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint.

(9) Any judgment of a district court under this subsection may be appealed to the court of appeals, and the judgment of the court of appeals affirming or setting aside, in whole or in part, any such order of the district court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28, United States Code.

(10) Any action brought under this subsection shall be advanced on the docket of the court in which filed, and put ahead of all other actions (other than other actions brought under this subsection or under section 310 of this Act.

...

(12)(A) Any notification or investigation made under this section shall not be made

public by the Commission or by any person without the written consent of the person receiving such notification or the person with respect to whom such investigation is made.

(B) Any member or employee of the Commission,or anyother preson, who violates the provisions of subparagraph (A) shall be fined not more than $2,000. Any such member, employee, or other person who knowingly and willfully violates the provisions of subparagraph (A) shall be fined not more than $5,000."

2 U.S.C. 437h:

"(a) The Commission, the national committee of any political party,or any individual eligible to vote in any election for the office of President may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.
(b) Notwithstanding any other provision of law, any decision on a matter certified under subsection (a) shall be reviewable by appeal directly to the Supreme Court of the United States. Such appeal shall be brought no later than 20 days after the decision of the court of appeals.
(c) It shall be the duty of the court of appeals and of the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible

extent the disposition of any matter certified under subsection (a).

28 U.S.C. 1915, the In Forma Pauperis Statute "frivolity provision"

"(d) The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious."

28 U.S.C. 1652, the Rules of Decision Statute:

"The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in all civil actions in the courts of the United States, in cases where they apply."

Supreme Court, U.S.
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CLERK

(3)

No. 85-659

# In the Supreme Court of the United States

OCTOBER TERM, 1985

ALWIN E. HOPFMANN, PETITIONER,

*v.*

FEDERAL ELECTION COMMISSION, RESPONDENT.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR RESPONDENT IN OPPOSITION

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NOVEMBER 15, 1985

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## QUESTIONS PRESENTED

1. Whether the Commission acted contrary to law when it dismissed petitioner's administrative complaint on the ground that a state party convention preceding a mandatory primary election was not itself an "election" within the meaning of the Federal Election Campaign Act.

2. Whether the courts below properly dismissed as frivolous the numerous constitutional claims petitioner sought to have certified to the *en banc* court of appeals pursuant to 2 U.S.C. § 437h.*

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* Petitioner has erroneously named Senator Edward Kennedy and the Committee to Reelect Senator Kennedy as respondents in his petition. Although he named these private parties as defendants along with the Commission in his original complaint in the district court, he later acceded to the Commission's position that they were not proper defendants and deleted them as parties when he filed his amended complaint.

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# In the Supreme Court of the United States

OCTOBER TERM, 1985

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No. 85-659

ALWIN E. HOPFMANN, PETITIONER,

*v.*

FEDERAL ELECTION COMMISSION, RESPONDENT.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

---

## BRIEF FOR RESPONDENT IN OPPOSITION

---

### OPINIONS BELOW

The opinion of the court of appeals, affirming the district court, is unpublished and appears in the appendix to the petition ("Pet. App.") at C-1. The memorandum opinion and order of the district court, affirming the Commission's dismissal of Mr. Hopfmann's administrative complaint and rejecting his constitutional claims as frivolous, are unpublished and are set forth in full in the Appendix to this brief, *see* n.4, *infra*. The Commission's General Counsel's Report explaining why Hopfmann's admin-

istrative complaint should be dismissed is set forth at Pet. App. A-1.[1]

## JURISDICTION

The judgment of the court of appeals was entered on May 13, 1985. On July 19, 1985 the court denied Mr. Hopfmann's petition for rehearing and suggestion for rehearing *en banc*. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

The relevant statutory provisions are set forth at Pet. App. Stat-4-5, 7-8, 17.

## COUNTERSTATEMENT OF THE CASE

This case arises from the Federal Election Commission's dismissal of an administrative complaint filed by Mr. Hopfmann against Senator Edward Kennedy. Hopfmann sought review of this dismissal in district court, and also asserted a large number of constitutional claims. The district court affirmed the Commission's dismissal of the administrative complaint and dismissed the constitutional claims as frivolous. The court of appeals affirmed and awarded attorneys' fees and costs to the Commission, finding the appeal frivolous.

### A. The Commission Proceedings

In September, 1982, Hopfmann filed with the Commission an administrative complaint pursuant to 2 U.S.C. § 437g, alleging that Senator Edward Kennedy's campaign committee had violated certain

---

[1] The Court has held that the General Counsel's Report provides the appropriate basis for reviewing a Commission decision. *FEC* v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27, 38 n.19 (1981).

statutory provisions, principally reporting obligations.[2] The complaint was grounded upon the contention that the Democratic state convention which preceded the 1982 Massachusetts primary election was itself an "election" under 2 U.S.C. § 431(1)(B).[3]

The Federal Election Campaign Act of 1971, as amended, *codified at* 2 U.S.C. §§ 431-455 ("the Act") includes within the definition of election only those party conventions vested with "authority to nominate a candidate." 2 U.S.C. § 431(1)(B). Massachusetts law and state party rules provide that candidates are "endorsed" by votes at the state party convention, but that the state primary election determines the party's nominee. Any candidates receiving at least 15% of convention support may appear on the primary ballot to compete with the endorsed candidate, and anyone can conduct a write-in cam-

---

[2] "Any person" who believes a violation of the Act has occurred may file a written, sworn complaint with the Commission. 2 U.S.C. § 437g(a)(1). Within five days, the Commission must notify the person(s) alleged to have committed the violation, who are provided 15 days to demonstrate in writing that no action should be taken on the complaint. *Id.* Thereafter, upon consideration of the complaint and any response filed, the Commission may determine it has "reason to believe" a violation has occurred and conduct an investigation, or may find "no reason to believe," close the file, and notify the complainant of its action. 2 U.S.C. § 437g(a)(2); *see* 11 C.F.R. § 111.9(b) (1985).

[3] If the convention had been an "election" under the Act, the Kennedy committee would have violated the Act's requirement that campaign committees file a report of receipts and disbursements at least 12 days before each election. 2 U.S.C. § 434(a)(2)(A)(i); 11 C.F.R. § 104.5(a)(1)(i).

paign.[4] On these facts, the Commission concluded that because the convention was not authorized by law or party rule to finally nominate a candidate, it was not an election under the Act (Pet. App. A). Finding, therefore, that there was no reason to believe Senator Kennedy's committee had violated the Act, the Commission dismissed the complaint.

### B. The District Court Proceedings

Mr. Hopfmann sued in the district court under 2 U.S.C. § 437g(a)(8) to overturn the Commission's decision, and later amended his complaint to include a variety of constitutional claims which he asked the district court to certify to the court of appeals sitting *en banc*, pursuant to 2 U.S.C. § 437h.

On March 8, 1984, the district court issued its memorandum opinion and order (App. 1a-10a).[5] Observing that the primary issue was whether the Commission's interpretation of the Act was "sufficiently reasonable" (App. 5a, *quoting FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 39 (1981)), the court found that "plaintiff's contentions were considered, and that the FEC's decision is consistent with its previous decisions," and that "the decision of the FEC dismissing plaintiff's complaint was reasonable. . . ." (App. 6a). The dis-

---

[4] Complainant Hopfmann had participated in the 1982 Massachusetts Democratic convention, but Senator Edward Kennedy won the majority of support. Because Mr. Hopfmann received less than 15% support there, he was not placed on the ensuing primary ballot. He did not attempt a write-in campaign.

[5] The reproduction of the district court's opinion in petitioner's appendix omits a portion of the text. Accordingly, "App. ——" refers to the appendix at the back of this brief, containing a full reproduction of the district court's opinion and order.

trict court therefore granted the Commission's motion for summary judgment (App. 10a).

The court then reviewed Hopfmann's constitutional claims and concluded that "plaintiff's challenges do not raise substantial constitutional questions, are frivolous and are not based on any coherent legal theory" (App. 7a). Accordingly, the court refused to certify Hopfmann's questions to the court of appeals *en banc*, and instead granted the Commission's motion to dismiss these claims (App. 10a).

### C. The Court of Appeals Decision

On May 13, 1985, the court of appeals affirmed the district court's decision (Pet. App. C-2). Initially, the court observed that dismissal of the appeal "would be appropriate under Fed. R. App. P. 3(a)" because of Mr. Hopfmann's repeated unjustified failure to comply with court orders (Pet. App. C-8-9). However, since briefing had been completed and the court had considered the merits of the case, the court instead went on to hold "that the appeal is in any event utterly without merit" and affirmed the district court (Pet. App. C-9).

The court first concluded that the Commission was warranted in dismissing Hopfmann's administrative complaint, finding that the Commission had consistently determined conventions which only narrowed the field of candidates on the primary ballot not to be "elections" under the Act and that neither the statute nor the legislative history contradicted this construction (Pet. App. C-5-6). Second, the court noted that "it is not within the FEC's province to determine whether Massachusetts' primary system satisfies the federal Constitution," and affirmed the district court's dismissal of Hopfmann's numerous constitutional

claims (Pet. App. C-6). Finally, concluding that Hopfmann's statutory claims were unsupported and the constitutional claims patently without merit, the court awarded the Commission attorneys' fees and costs for a frivolous appeal, pursuant to Fed. R. App. P. 38 and 28 U.S.C. § 1912 (Pet. App. C-10).

On July 19, 1985, the court denied Mr. Hopfmann's petition for rehearing (App. 11a), and on August 8, 1985, it awarded the Commission costs and attorneys' fees in the amount of $3578.90 (Pet. App. K-1), which Mr. Hopfmann has so far failed to pay.

## REASONS WHY THE WRIT SHOULD BE DENIED

Petitioner has failed to show that any of his numerous Questions Presented warrants this Court's review. Sup. Ct. R. 17.1.[6] The decision below determined only that the Commission did not abuse its discretion in dismissing an administrative complaint, and that the district court properly followed this Court's settled construction of 2 U.S.C. § 437h when it dismissed a number of purported constitutional questions found to be frivolous on their face. Petitioner has alleged no conflict among the circuits, and the decision of the court below clearly comports with this Court's prior decisions under the Act. Accordingly, the petition should be denied.

---

[6] Mr. Hopfmann's Questions Presented fill eighteen pages at the front of his petition and the remainder of the petition is similarly rambling, redundant, and in parts unintelligible. It would appear that the petition thus violates Rule 21.5 of the Rules of this Court, and should be rejected for this reason alone. *Cf. Huffman* v. *Pursue,* 419 U.S. 892 (1974).

## I. THE COMMISSION'S DISMISSAL OF HOPFMANN'S ADMINISTRATIVE COMPLAINT WAS NOT CONTRARY TO LAW.

As this Court has recognized, the standard the courts utilize in reviewing the Commission's dismissal of an administrative complaint under 2 U.S.C. § 437g (a)(8)(C) is a narrow one: whether the Commission's action was arbitrary, capricious, an abuse of discretion or otherwise contrary to law. *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 31, 37 (1981). When reviewing the Commission's interpretation of the Act, the courts must afford substantial deference to the Commission's view:

> [T]he task for the Court of Appeals was not to interpret the statute as it thought best but rather the narrower inquiry into whether the Commission's construction was "sufficiently reasonable" to be accepted by a reviewing court. [Citations omitted]. To satisfy this standard it is not necessary for a court to find that the agency's construction was the only reasonable one or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.

*FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. at 39. As we show below, the lower courts properly applied this standard of review in affirming the Commission's dismissal of Mr. Hopfmann's administrative complaint.

The Act contains, *inter alia*, reporting requirements and contribution limitations for each separate election. 2 U.S.C. §§ 434(a)(2)(A), 441a(a)(1), (6). The Act defines election to include: (1) "a general, special, primary or runoff election;" and (2) "a convention or caucus of a political party which has author-

ity to nominate a candidate." 2 U.S.C. § 431(1)(A), (B).[7] Thus, the determinative question in this case was whether the 1982 Massachusetts Democratic Pre-Primary Convention had the "authority to nominate a candidate."

The Commission has consistently construed the Act's definition of election to apply only if a convention has the legal authority to actually award the party's nomination to a candidate, without the necessity of running in a subsequent primary campaign. *See* Advisory Opinions ("AO") 1980-60, 1978-30, 1976-58, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶¶ 5499, 5325, 5211.[8] In states where the candidate endorsed by the convention must still run in a primary election before actually being awarded the party's nomination, the Commission has always found a party convention not to be an "election" under the

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[7] Commission regulations provide that a party convention is an election only if it "has the authority to select a nominee for federal office on behalf of that party." 11 C.F.R. § 100.2(e).

[8] Any person may submit a request concerning application of the Act or of Commission rules to "a specific transaction or activity by the person," and the Commission must render a written advisory opinion within 60 days upon which the requestor and other similarly situated persons may rely. 2 U.S.C. § 437f(a), (c).

Contrary to petitioner's characterization (Pet. 46), the Commission found the Connecticut pre-primary convention at issue in AO 1976-58 to be an election not because in a particular instance only one candidate might qualify for the primary ballot under Connecticut's 20% threshold requirement, but because the statute expressly provided that in such situations "no primary shall be held . . . for such office and the [convention-endorsed] candidate for such office shall be deemed to have been lawfully chosen as the [party's nominee] for such office." 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5211 at p. 10,153, *citing* Conn. Gen. Stat. 9-416 (1976).

Act. *See* AO's 1984-16, 1981-29, 1978-25, 1 Fed. Elec. Camp. Fin. Guide (CCH), ¶¶ 5758, 5616, 5320.

Massachusetts requires party candidates for statewide and federal office to be nominated by a plurality of the vote in the primary election. Mass. Gen. Laws ch. 53, §§ 2, 41 (1980) (Pet. App. Stat-4, 5). There is no provision in Massachusetts law recognizing any circumstances in which a candidate can obtain a party's nomination without winning a primary election, no matter what the vote of the party convention. The Massachusetts Democratic Party Charter also does not authorize the party convention to nominate a candidate. Rather, the Charter authorizes the convention to "endorse" candidates by majority vote, and provides that any candidates not endorsed but having received at least 15% of convention support may appear on the ballot with the "endorsed" candidate in the subsequent primary election. Article Six, Section III, *Charter of the Democratic Party of the Commonwealth of Massachusetts* (Pet. App. Stat-7-8). Although the State of Massachusetts has enforced the party's 15% rule as an additional condition to appearance on the primary ballot, it continues to require in all cases that a candidate run in and win a primary election before being recognized as the party's nominee in the general election.[9]

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[9] The 15% rule was enforced by Massachusetts state officials during the 1982 election cycle after the Massachusetts Supreme Judicial Court rendered an advisory opinion concluding that this was required. *Opinion of the Justices,* 434 N.E.2d 960 (1982). That court later confirmed this conclusion in a lawsuit brought by a candidate for the nomination for Lieutenant Governor who had been omitted from the primary ballot because he received less than 15% of convention support. *Langone* v. *Secretary of Commonwealth,* 446 N.E.2d 43 (Mass.), *appeal dismissed, cert. denied,* 103 S. Ct. 1510 (1983).

In sum, Massachusetts statute and party rules in no case authorize the convention actually to select the party's candidate and dispense with the primary election. Thus, the Commission properly applied its consistent construction of the Act when it concluded that the Massachusetts Democratic convention did not have "authority to nominate a candidate", 2 U.S.C. § 431(1)(B), and was therefore not an "election" under the Act (Pet. App. A-11-12). *See also* AO 1984-16, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5758 (1984 Massachusetts Democratic Convention not "election").[10]

Petitioner Hopfmann points to nothing in the legislative history indicating a congressional intent contrary to the Commission's interpretation of section 431(1)(B). Nor does he appear to disagree with the Commission's conclusions as to how Massachusetts actually applied the rules governing the state party convention and the primary election. Rather, he argues (Pet. 10-16, 33-46) that the 15% party rule which resulted in his omission from the 1982 primary election ballot is invalid for a variety of legal and constitutional reasons, and should have been pronounced so by the Commission. As the court of appeals concluded, however (Pet. App. C-6), the Commission's

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[10] To the extent that petitioner argues that the pre-primary convention in *his* case must have been an election because it turned out that Senator Kennedy was unopposed in the primary, he is wrong. The Commission's regulations expressly provide that "[a]n election in which a candidate is unopposed is a separate election." 11 C.F.R. § 110.1(j)(2). Any ballot access rules can *sometimes* result in only one name appearing on the ballot and the Massachusetts system is no different; while Senator Kennedy was the only name on the ballot for the U.S. Senate nomination, five candidates were on the 1982 Democratic primary ballot for Lieutenant Governor. *Langone* v. *Secretary of Commonwealth*, 446 N.E.2d at 45, 48.

function is only to determine the convention's authority under the Massachusetts rules actually employed at the time, and to decide whether those rules made the convention an "election" within the Act; it is not up to the Commission to decide whether Massachusetts' system is constitutional. Thus, none of his contentions regarding the validity of the party rule or his omission from the ballot is germane to this case.[11] Indeed, petitioner is well aware of the proper forum for these claims, for the First Circuit recently resolved his appeal directly challenging Massachusetts' enforcement of the 15% rule, and he can properly bring those issues before this Court by seeking review of *that* court's decision. *Hopfmann* v. *Connolly*, 769 F.2d 24 (1st Cir. July 31, 1985) (*reh'g denied*, September 23, 1985), *on remand from* 105 S. Ct. 2106. Those contentions, however, provide no grounds for disturbing the Commission's decision here.[12]

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[11] Contrary to petitioner's assertions (Pet. 42-45), the Commission did not purport to consider or decide whether the availability of write-in campaigns could cure any otherwise unconstitutional restrictions on ballot access. It noted the statutory recognition of write-in campaigns, Mass. Gen. Laws ch. 53, §§ 3, 35A, 52 (1980), only as additional evidence that the Massachusetts primary election remains the final step in the nominating process, even in the case where only one candidate qualifies for the ballot.

[12] Of course, the Commission concluded that the convention was not an election even with the application of the party's 15% rule. If the 15% rule had been disregarded, as Mr. Hopfmann argues it should, the convention would *a fortiori* not be an "election" under the Act, for this would widen access to the primary ballot to candidates who meet the state's other requirements.

## II. PETITIONER'S CONSTITUTIONAL CLAIMS WERE PROPERLY DISMISSED AS FRIVOLOUS.

Section 437h of Title 2, United States Code, is an extraordinary jurisdictional statute which permits any individual voters to bring a declaratory judgment action raising a question as to the constitutionality of a provision of the Act, which the district court is required to certify to the *en banc* court of appeals. The *en banc* court's decision is reviewable by direct appeal to this Court.[13] This Court has held that section 437h does not "require certification of constitutional claims that are frivolous." *California Medical Association* v. *FEC*, 453 U.S. 182, 193-94 n.14 (1981). *Accord*, *Mott* v. *FEC*, 494 F. Supp. 131, 134 (D.D.C. 1980) (section 437h applies only to "serious" constitutional questions), *aff'd mem. sub nom. National Conservative Political Action Committee* v. *FEC*, 672 F.2d 896 (D.C. Cir. 1981).[14]

Of the several pages of constitutional issues listed by Hopfmann in his Questions Presented (Pet. QP-12-16), only a few are even supported by argument (Pet. 55-60) as required by Sup. Ct. R. 21.5. First, Hopfmann argues (Pet. 56) that the Commission's enforcement and advisory opinion authority, 2 U.S.C.

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[13] Former section 437h(c) further provided for expedited hearing in the court of appeals and in this Court. While petitioner's case was on appeal, however, Congress repealed subsection (c). Pub. L. 98-620, § 402(1)(B), 98 Stat. 3335, 3357 (1984).

[14] Contrary to petitioner's assertions (Pet. 5 n.1, 27-28, 50-55), this Court's conclusion in *California Medical* is not inconsistent with section 437h's requirement that "all questions of constitutionality" be certified, for constitutional claims that are settled or frivolous are "essentially fictitious," *Bailey* v. *Patterson*, 369 U.S. 31, 33 (1962), and thus not actual constitutional "questions" at all.

§§ 437f, 437g, are "assertion[s] of judicial power," and violate the "case or controversy" requirement of Article III. However, it has long been settled that Congress can require that the initial determination with respect to congressionally created rights and obligations be made by non-Article III tribunals, *Crowell* v. *Benson*, 285 U.S. 22, 54 (1932); *Gibas* v. *Saginaw Mining Company*, 748 F.2d 1112, 1119 (6th Cir. 1984), *cert. denied*, 105 S. Ct. 2357 (1985), and the Article III "case or controversy" requirement by its terms applies only to the federal courts and not to administrative agencies created by Congress under Article I. *See Tennessee Gas Pipeline Co.* v. *Federal Power Commission*, 606 F.2d 1373, 1380 (D.C. Cir. 1979). Furthermore, the courts have approved the use of advisory opinions as a valuable mechanism to reduce uncertainty in the law's application. *See CSC* v. *Letter Carriers*, 413 U.S. 548, 580 (1973); *Martin Tractor Co.* v. *FEC*, 627 F.2d 375, 384-86, 388-90 (D.C. Cir.), *cert. denied*, 449 U.S. 954 (1980).[15]

Petitioner's contention (Pet. 56) that the Commission has violated Article I, Sec. 5, cl. 1 by improperly judging the elections and qualifications of Congress's members is absurd. As discussed *supra*, pp. 10-11, the Commission has never purported to decide how elections are to be conducted in Massachusetts; it has only recognized how Massachusetts itself has chosen to conduct them. Finally, Hopfmann contends (Pet. 57, 59-60) that the Secretary of the Senate's designee,

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[15] Hopfmann's reliance (Pet. 57, n.12) upon individual statements in the legislative history opposing granting the Commission the power to issue advisory opinions "warrant[s] little comment in light of Congress' failure to heed them. . . ." *Action For Children's Television* v. *FCC*, 564 F.2d 458, 477 n.30 (D.C. Cir. 1977).

a non-voting *ex officio* member of the Commission (*see* 2 U.S.C. § 437c(a)(1)), should have been precluded from participation in this case because of a conflict of interest when the respondent is an incumbent senator. However, even if it had merit, Hopfmann waived the right to raise this issue in court by failing to present it to the Commission. *See, e.g.*, *Gibson* v. *FTC*, 682 F.2d 554, 563-66 (5th Cir. 1982), *cert. denied*, 460 U.S. 1068 (1983) (citing cases).

In sum, Petitioner's strenuous objections to the Massachusetts party rule and his omission from the primary ballot are not relevant to this case, and the rest of his contentions are muddled, settled, or plainly wrong.[16] Thus, as the judges of the courts below unanimously concluded, Mr. Hopfmann's constitutional arguments are too frivolous to warrant the attention of this Court.

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[16] Petitioner's complaint (Pet. 31-33) about the court of appeal's conclusion (Pet. App. C-7-9) that his appeal could have been dismissed for failure to obey court orders is not properly before the Court, since the court of appeals did not rest on this determination but proceeded to adjudicate the appeal on its merits, *see* p. 5, *supra*. We note, however, that Mr. Hopfmann's claim of unequal treatment is based upon a mischaracterization of the court of appeals' order regarding the filing of the appendix (Pet. App. J-2) and that, unlike Mr. Hopfmann, the Commission filed a proper motion whenever it needed additional time.

## CONCLUSION

For the reasons stated above, the Commission requests that the petition for a writ of *certiorari* be denied.

Respectfully submitted,

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NOVEMBER 15, 1985

# APPENDIX

## APPENDIX

## UNITED STATES DISTRICT COURT
## FOR THE DISTRICT OF COLUMBIA

---

Civil Action No. 82-3667

ALWIN E. HOPFMANN, PLAINTIFF

*v.*

FEDERAL ELECTION COMMISSION, ET AL., DEFENDANTS

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[Filed Mar. 8. 1984]

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## MEMORANDUM OPINION

Plaintiff Alwin E. Hopfmann seeks review of the Federal Election Commission's ("Commission" or "FEC") dismissal of his administrative complaint alleging that Senator Edward Kennedy and the Committee to Re-Elect Senator Kennedy ("Committee") violated provisions of the Federal Election Campaign Act ("FECA" or "Act") relating to reporting requirements and contribution limitations. 2 U.S.C. §§ 434(a), (b), and 441a(f). Plaintiff's request for review presents two issues: whether the FEC decision is "contrary to law"; whether plaintiff's constitutional challenges merit certification to the United States Court of Appeals.[1] For the following reasons,

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[1] The two relevant provisions of the statute are discussed *infra* at pages 5 and 7.

this Court affirms the FEC decision, finding that it was proper and correct, and declines to certify plaintiff's constitutional challenges to the United States Court of Appeals.

Plaintiff Hopfmann was a participant in the Massachusetts Democratic Party's pre-primary convention held in May 1982. Among its purposes, the convention was to endorse those candidates who received at least 15% of the votes from party delegates. Under Massachusetts law, only those candidates with 15% support from their party can be placed on the ballot for the primary election. Mass. Gen. Laws Ann., ch. 53, § 44 (West 1975). The incumbent Senator Kennedy was the sole candidate to receive 15% of the convention votes, consequently, only his name was placed on the ballot for the September 1982 primary election.

Plaintiff filed a complaint with the Federal Election Commission in September 1982, asserting that the earlier convention of May satisfied the criteria of an "election" as defined in the Act, and therefore Senator Kennedy and the Committee violated certain reporting requirements of the Act pertaining to elections. Section 431(1)(B) of the Act defines "election" as follows:

> The term "election" means . . . a convention or caucus of a political party which has authority to *nominate* a candidate.

(emphasis added). Plaintiff claimed that since the convention vote resulted in the exclusive endorsement of Senator Kennedy (and consequently only his name appeared on the September primary election ballot), the convention in fact had authority to nominate a candidate and thus was an "election" under the Act.

On October 25, 1982 the Commission by letter dismissed the plaintiff's complaint on the basis of the "Expedited First General Counsel's Report" ("Report") of October 22, 1982.[2] The General Counsel explained:

> Because the convention is merely a "winnowing-out" process and does not under any circumstances result in the nomination of a candidate until after the primary election is held, the convention should not be considered as an election for purposes of the Federal Election Campaign Act of 1971, as amended.

Report at 6 (attachment to plaintiff's complaint). He further noted that Massachusetts law provides for write-in campaigns, Mass. Gen. Laws Ann., ch. 53, § 3 (West 1975), so that the election process does not terminate with the vote of the party's convention delegates. The Commission found no reason to believe that Senator Kennedy or the Committee violated any of the reporting provisions of the Act.

Plaintiff then brought this action under section 437g(a)(8)(A) seeking judicial review of the dismissal of his complaint. Later, in an amended complaint, plaintiff sought certification of his constitutional challenges under section 437h.

Numerous motions have been filed by both parties in this case,[3] and the plaintiff has chosen an unusual

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[2] Although the Commission did not expressly adopt the General Counsel's Report in announcing its decision, the Report is viewed as the record upon which the Commission based its decision. *See* Federal Election Commission v. Democratic Senatorial Campaign Committee, 454 U.S. 27, 38-39 n.19 (1981).

[3] The FEC moved to dismiss for lack of jurisdiction, insufficiency of process and failure to prosecute. The Court denies

series of motions to advance his complaint against the FEC.[4] In this opinion the Court addresses defendant's motion for summary judgment regarding the FEC decision, and defendant's motion to dismiss plaintiff's constitutional challenges.

*A.*

First, this Court considers plaintiff's challenge to the dismissal of his complaint. The standard of review is explained in section 437g(a)(8)(C):

> (T)he court may declare that dismissal of the complaint . . . is contrary to law, and may direct the Commission to conform with such declaration within 30 days, failing which the complainant may bring . . . a civil action to remedy the violation involved in the original complaint.

To find that the Commission acted contrary to law, it must be shown that its decision was arbitrary or

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this motion finding that the complaint was timely filed, and that defendant has failed to show that the relatively brief delay in service of process would justify dismissal. *See*, e.g., Prudential Lines, Inc. v. Marine Repair Services, Inc., 94 F.R.D. 325 (E.D.N.Y. 1982).

[4] A number of plaintiff's motions are not germane to the central issues, nor are they based on any coherent legal theory. For example, plaintiff's motion of May 31, 1983 for "Continuance Until Discovery Can be Completed" is completely inappropriate because this Court's review under section 437g is based on the record before the Commission at the time it made its decision. Discovery is likewise inappropriate to determine the merits of plaintiff's constitutional challenges.

Plaintiff's motion of July 26, 1983, requesting leave to add certain additional parties, and of July 29, 1983, requesting clarification of what constitutes the "pleadings" under the statute, also lack merit.

capricious, or an abuse of discretion. In *Federal Election Commission* v. *Democratic Senatorial Campaign Commission*, 454 U.S. 27, 39 (1981), the Supreme Court noted that the scope of review was limited and that the task of the reviewing court "is not to interpret the statute as it thought best but rather the narrower inquiry into whether the Commission's construction was 'sufficiently reasonable' to be accepted by a reviewing court."

When the Commission reached its decision of October 25, 1982, it had the Report of its General Counsel which addressed the issue of whether the Democratic pre-primary convention satisfied the criteria of an "election" as defined in the Act. The Report contained an analysis of the charter of the Democratic Party of Massachusetts and relevant Massachusetts state laws. Additionally, the Report contained references to an Advisory Opinion from the Supreme Judicial Court of Massachusetts regarding a proposed change in Massachusetts state law governing the election process and earlier FEC advisory opinions. The General Counsel concluded that the crucial distinction between the "endorsement" process of the Massachusetts Democratic convention, and the "nomination" process of other state conventions found to be elections under the Act, was the fact that the former allowed for write-in campaigns at the primary elections. The General Counsel explained:

> The primary election contest in Massachusetts does not in any circumstances terminate with the vote of the party's convention delegates. Massachusetts still holds a primary election. Certification that a candidate is his or her party's nominee must await the results of the primary contest. The contest is not a hollow proce-

> dure because the Massachusetts General Laws provide for write-in campaigns.

Report at 5. He further explained that although Senator Kennedy was the only candidate to receive the convention's endorsement for the primary election, "until the voters spoke at the polls in September, there was no Democratic Party nominee for the U.S. Senate from Massachusetts." *Id.* at 6. Thus, because the convention did not satisfy the criteria of an "election" under the Act, the General Counsel concluded that Senator Kennedy and the Committee had not violated the Act's reporting requirements.

This Court finds that the decision of the FEC dismissing plaintiff's complaint was reasonable in light of the General Counsel's Report. Furthermore, the plaintiff's arguments challenging the Commission's decision are without merit. Plaintiff asserts that the FEC has given no reason for its decision, but that is not true. The General Counsel's Report adequately sets out the reasons upon which the FEC's decision is based. Furthermore, it is apparent that plaintiff's contentions were considered, and that the FEC's decision is consistent with its previous decisions. For the foregoing reasons, this Court finds that the FEC's decision was "sufficiently reasonable" to merit this Court's deference.

*B.*

The plaintiff's request for certification of his constitutional challenges is brought under section 437h of the Act which provides:

> (A)ny individual eligible to vote in any election for the office of President . . . may institute such actions in the appropriate [federal] district court . . . , including actions for declaratory judgment, as may be appropriate to construe the

> constitutionality of any provision of the Act. The district court immediately shall certify all questions of constitutionality . . . to the court of appeals for the [federal] circuit involved.

Plaintiff argues that this provision requires the Court to certify his constitutional challenges to the United States Court of Appeals without regard to the merit of his claims. However, in *California Medical Ass'n* v. *Federal Election Commission*, 453 U.S. 182, 193-194 n.14 (1981), the Supreme Court plainly stated, "(W)e do not construe § 437h to require certification of constitutional claims that are frivolous . . ." (citing *Gifford* v. *Congress*, 452 F. Supp. 802 (E.D. Ca. 1978)). Furthermore, in *Mott* v. *Federal Election Commission*, 494 F. Supp. 131, 134 (D.D.C. 1980), the court found that review of a complaint to determine whether it presents a ripe and substantial constitutional controversy is appropriate before certifying questions pursuant to section 437h.

After careful consideration, this Court concludes that plaintiff's challenges do not raise substantial constitutional questions, are frivolous and are not based on any coherent legal theory. He asserts a wide range of challenges to the Act: (1) that it violates Article I of the Constitution and the Seventeenth Amendment by regulating the times, places, and manner of holding elections for United States senators; (2) abridges plaintiff's rights to due process by not affording him a full hearing before the FEC; (3) denies plaintiff equal protection of the laws by protecting the incumbent politician; (4) violates the "case or controversy" requirement of the Constitution by allowing the Commission to rely on earlier FEC advisory opinions in its decisionmaking process; (5) violates the First Amendment because the Act

prevents an individual who is a losing candidate in a political election from petitioning for redress in the courts; (6) violates the Seventh Amendment by denying plaintiff a jury trial on his complaint.

Plaintiff's allegations that the FEC has violated Article I of the Constitution and the Seventeenth Amendment are groundless. The fact is that the state of Massachusetts determines the time, place and manner of its elections, not the FEC. Plaintiff has thus failed in his attempt to convince this Court that the FEC has violated the doctrine of separation of powers or the Seventeenth Amendment by finding that the Massachusetts Democratic Convention was not an "election" under the Act. Similarly, plaintiff's due process challenge must fall because he claims the right to an adversarial proceeding when in fact the FEC proceedings do not determine an individual's legal rights. *See Hannah* v. *Larche*, 363 U.S. 420, 441-42 (1980). Also, plaintiff's arguments alleging that he has been denied equal protection of the laws is without merit. Beyond a bare assertion, he provides no factual basis for his allegations that the FEC's decision was intended to "protect the incumbent." Furthermore, this type of equal protection claim previously has been rejected by the Supreme Court. *See Buckley* v. *Valeo*, 424 U.S. 1, 96 (1976).

His complaint about the FEC's use of advisory opinions is meritless and overlooks the fact that the United States Court of Appeals for the District of Columbia has approved the use of such opinions insomuch as they contribute to consistency in the administrative process. *See Martin Tractor Co.* v. *Federal Election Commission*, 627 F.2d 375, 384 (D.C. Cir. 1980), *cert. denied sub. nom. National*

*Chamber Alliance for Politics* v. *Federal Election Commission*, 449 U.S. 954 (1980). Likewise, plaintiff's First Amendment claim is frivolous because the FECA provides for judicial review under section 437g(a)(8)(C), and for certification of constitutional claims under section 437h, to facilitate access to the courts, not to prevent it. Finally, plaintiff's claim under the Seventh Amendment is without merit under *Lehman* v. *Nakshian*, 453 U.S. 156 (1981). There the Supreme Court stated that a "plaintiff in an action against the United States has a right to trial by jury *only* where Congress has affirmatively and unambiguously granted that right by statute." *Id.* at 168 (emphasis added). The FECA does not provide for jury trials and thus the plaintiff's Seventh Amendment challenge must fall.

## CONCLUSION

For the reasons set out above the plaintiff's request for review and judicial relief by this Court are denied. An appropriate order dismissing the complaint will be entered.

March 8, 1984

/s/ Barrington D. Parker
BARRINGTON D. PARKER
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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Civil Action No. 82-3667

ALWIN E. HOPFMANN, PLAINTIFF

*v.*

FEDERAL ELECTION COMMISSION, ET AL., DEFENDANTS

---

[Filed Mar. 8, 1984]

---

ORDER

The Court having fully considered defendant Federal Election Commission's Motion to Dismiss and for Summary Judgment, it is this 8th day of March, 1984

ORDERED

That the Motion to Dismiss is granted as to the plaintiff's constitutional claims and those claims are dismissed with prejudice.

That summary judgment is granted to the defendant Federal Election Commission as to the plaintiff's administrative claims, and judgment is entered in favor of the defendant.

That the complaint of the plaintiff is dismissed with prejudice.

/s/ Barrington D. Parker
BARRINGTON D. PARKER
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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September Term, 1984

CA No. 82-03667

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No. 84-5207

ALWIN E. HOPFMANN

*v.*

UNITED STATES FEDERAL
ELECTION COMMISSION, ET AL.

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[Filed July 19, 1985]

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Before: Edwards, Scalia and Starr, Circuit Judges

ORDER

Upon consideration of the petition for rehearing of appellant Alwin E. Hopfmann, it is

ORDERED, by the Court, that the petition is denied.

*Per Curiam*

FOR THE COURT
GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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September Term, 1984

CA No. 82-03667

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No. 84-5207

ALWIN E. HOPFMANN

*v.*

UNITED STATES FEDERAL
ELECTION COMMISSION, ET AL.

---

[Filed July 19, 1985]

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Before: Robinson, Chief Judge; Wright, Tamm, Wald, Mikva, Edwards, Ginsburg, Bork, Scalia and Starr, Circuit Judges

ORDER

The suggestion for rehearing *en banc* of appellant Alwin E. Hopfmann has been circulated to the full Court and no member has requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

*Per Curiam*
FOR THE COURT
GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

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No. 85-659 (4)

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In The

SUPREME COURT OF THE UNITED STATES
October Term, 1985

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ALWIN E. HOPFMANN,

Petitioner

vs.

THE UNITED STATES FEDERAL ELECTION COMMISSION, EDWARD M. KENNEDY AND THE COMMITTEE TO RE-ELECT SENATOR KENNEDY,

Respondents.

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# Motion of The Free Congress Research and Education Foundation To File Brief Amicus Curiae Out of Time and Brief Amicus Curiae In Support of Petition For Certiorari

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Respondents.

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# Motion of The Free Congress Research and Education Foundation To File Brief Amicus Curiae Out of Time

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The Free Congress Research and Education Foundation ("Foundation") respectfully moves this Court for leave to file the accompanying brief amicus curiae in support of the Petitioner herein.

Although the attorneys for Petitioner have consented to Foundation's filing of a brief amicus curiae, at the time of the filing of this Motion, Foundation has not received the consent of the Respondents to the filing of a brief amicus curiae.

The Foundation's Motion is out of time by five days, the original due date having been November 16, 1985. The Foundation first learned of the case on November 12, 1985. Counsel for the Foundation was asked to prepare a Brief Amicus Curiae on November 15, 1985. Counsel were originally erroneously informed that the briefs of amicus curiae concerning the Petition for Certiorari were due on November 18, 1985.

The Foundation attempted to file an amicus brief on November 18 but was informed by the Clerk the following day that the time for filing such briefs expired on

Saturday, November 16, 1985. The Foundation thereupon discovered that the original computation of the due date was erroneous because it failed to consider that the Court is open for the submission of documents on Saturdays. The Foundation has now revised its filing to request the permission of this Court to file its brief despite the fact that it is out of time.

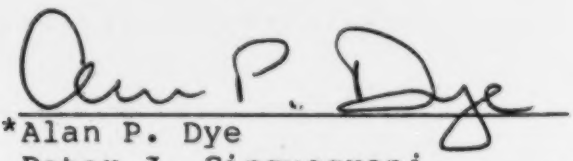
The Foundation is a nonprofit educational organization existing under the laws of the District of Columbia. The Foundation conducts educational activities and research and publishes books and journals concerning the operation of the federal government. Since 1980 the Foundation has conducted a Judicial Reform Project focusing on the conduct of the judiciary and possible reforms.

The Foundation supports restrained and principled judicial decision-making. In furtherance of that goal, the Foundation seeks to participate in important litigation and has published several books in the area, including A Blueprint for Judicial Reform (1981) and Criminal Justice Reform (1983).

Amicus is concerned that the conduct of the lower courts in enforcing the Federal Election Campaign Act of 1971 has not been in accord with the soundest principles of judicial administration. The Foundation is deeply concerned that the courts are attempting to eliminate a procedural rule established by Congress and are thereby violating established principles of separation of powers.

WHEREFORE, Free Congress Research and Education Foundation requests this Court to grant this Motion and permit the Foundation to file the brief amicus curiae attached hereto.

Respectfully submitted,



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No. 85-659

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1985

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ALWIN E. HOPFMANN,

Petitioner

vs.

THE UNITED STATES FEDERAL ELECTION COMMISSION, EDWARD M. KENNEDY AND THE COMMITTEE TO RE-ELECT SENATOR KENNEDY,

Respondents.

---

# BRIEF AMICUS CURIAE OF THE FREE CONGRESS RESEARCH AND EDUCATION FOUNDATION

---

## PRELIMINARY STATEMENT

The Free Congress Research and Education Foundation submits this brief amicus curiae in support of Petitioner Hopfmann's Petition for Writ of Certiorari.

## INTEREST OF AMICUS CURIAE

As set forth in the motion for leave to file this brief, the Free Congress Research and Education Foundation ("Foundation"), is concerned with principled and restrained judicial decision-making and maintenance of the separation of powers. The Foundation supports judicial reform and the efficient administration of justice.

The decisions of the lower courts in this case threaten to eviscerate Section 437h of the Federal Election Campaign Act of 1971, as amended. By establishing undue barriers to the availability of Section 437h the courts both infringe on the right of Congress to establish court procedure and reduce the protections Congress intended to provide the election process.

The Foundation believes that proper judicial administration requires the Court

to consider this case and to use it to establish rules for the availability of Section 437h. Such rules will reduce the unbridled discretion of district court judges and protect the procedures established by Congress.

## ARGUMENT

Congress establishes the procedure and jurisdiction of the inferior federal courts. Kline v. Burke Construction Co., 260 U.S. 226, 234 (1922); U.S. Constitution, Article III, Section 1. The Federal Election Campaign Act (FECA) of 1971, as amended, establishes a detailed procedure for consideration of constitutional challenges to FECA's provisions. FECA provides that cases shall be brought in the district court and that "the district court shall certify all questions of constitutionality

of this Act to the United States Court of Appeals for the cricuit involved, which shall hear the matter sitting en banc" 2 U.S.C. 437h (a) (1985).

Despite the broad language of section 437h, the courts have imposed restrictions on the certification procedure. One such restriction applied by the courts has been that "frivolous" claims need not be certified. California Medical Association v. Federal Election Commission, 453 U.S. 182, 192, n. 14 (1981); Gifford V. Tierman, 670 F.2d 882 (9th Cir.), cert. denied, 459 U.S. 804 (1982). The district court in this case deemed petitioner's constitutional claims to be frivolous and therefore refused to certify them.

In California Medical Association this Court indicated that frivolous claims might

not have to be certified. 453 U.S. at 192 n. 14. The discussion of a possible exception for "frivolous claims" was not required for decision of the case and was therefore dictum. The Court also gave no indication of what test might be used by the lower courts in determining whether a claim is frivolous.

Without further clarification by this Court the lower courts are left to determine for themselves whether "frivolous" claims must be certified and what claims are "frivolous." There is a distinct danger that the "frivolousness" exception could expand to such an extent that there will be little that remains of the original rule requiring certification. The lower courts may be sorely tempted to use this "frivolousness" limitation to dispose of politically unpopular cases or simply to limit the caseload of the appellate courts.

Congress has the power to establish whatever procedures it deems best for the inferior federal courts. The courts may not undermine that authority by creating additional tests not present in the statute. The courts through imposition of additional barriers to use of Section 437h are violating fundamental principles of separation of powers and undercutting the clear intention of Congress. If there is to be "frivolity" rule this Court should structure a test which restricts the discretion of the lower courts so that Section 437h is not rewritten or repealed by judicial fiat.

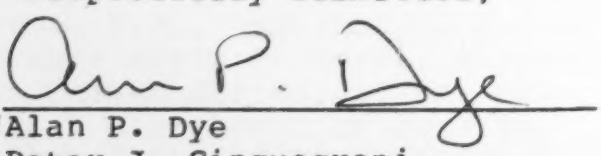
In its capacity of supervisor of the lower courts this Court should review this case to determine, first, whether a "frivolity" test should be applied in Section 437h cases, and if so, what standard

should be used to determine "frivolousness" in such cases.

## CONCLUSION

For the reasons stated herein and for the reasons advanced by Petitioner, Hopfmann, it is respectfully urged that the Petition for Writ of Certiorari to the Court of Appeals for the District of Columbia Circuit be granted.

Respectfully submitted,



*Alan P. Dye
Peter J. Cinquegrani
Webster, Chamberlain & Bean
1747 Pennsylvania Avenue, N.W.
Washington, D.C. 20036
(202) 785-9500

* Counsel of Record

CERTIFICATE OF SERVICE
UNDER RULE 28

I hereby certify that I am a member of the bar of this Court, and that I have served, by mailing copies in duly addressed envelopes with first class postage prepaid, this 21 day of November, 1985, true and accurate copies of this Motion to File Brief Amicus Curiae Out of Time and Brief Amicus Curiae in Support of Petition for Certiorari, three in number, to Charles N. Steele, Esquire, General Counsel of the Federal Election Commission, 1325 K Street, N.W., Washington, D.C., and upon William Oldaker, Esquire, counsel for Edward M. Kennedy and the Committee to Re-elect Senator Kennedy, 1140 19th Street, N.W., Washington, D.C., upon the Honorable Edwin P. Meese, Attorney General of the United States, at the Main Justice Building, Department of Justice, Washington, D.C., 12th and Pennsylvania Avenue, N.W., and upon the United States Attorney for the District of Columbia, United States Court House, 4th and Constitution Avenue, N.W., Washington, D.C.

Alan P. Dye

Alan P. Dye
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Supreme Court, U.S.
FILED
NOV 27 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-659 (5)

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1985

ALWIN E. HOPFMANN,
Petitioner

v.

UNITED STATES FEDERAL ELECTION COMMISSION, EDWARD M. KENNEDY and THE COMMITTEE TO RE-ELECT SENATOR KENNEDY,
Respondents,

# PETITION FOR THE WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Appendix, Vol. 2, Supplementary

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No. 85-659

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## Appendix, Vol. 2, Supplementary

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(202) 628-1114

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTIO NO.

ALWIN E. HOPFMANN
29 Tuttle Road
Sterling, MA 01564,

Petitioner,

v.

UNITED STATES FEDERAL
ELECTION COMMISSION
Washington, D.C. 204634

and

EDWARD M. KENNEDY
109 Russell Senate Office Bldg.
Washington, D. C. 20510

and

THE COMMITTEE TO RE-ELECT
SENATOR KENNEDY
140 Federal Street
Boston, MA 02110

Respondents.

PETITION TO DECLARE FEDERAL ELECTION COMMISSION ACTION CONTRARY TO THE LAWS AND TO THE CONSTITUTION

Petitioner, ALWIN E. HOPFMANN, acting by and through his undersigned attorney, hereby petitions this honorable court to

review action taken by the FEDERAL ELECTION COMMISSION in dismissing petitioner's Complaint, filed on September 13, 1982, a copy of which is attached hereby and hereby incorporated by reference into this petition which dismissal was by letter dated October 25, 1982 and served upon the petitioner-plaintiff by mail at his home in Massachusetts, which letter was accompanied by a document entitled "EXPEDITED FIRST GENERAL COUNSEL'S REPORT" which was signed for respondent by Charles N. Steele, General Counsel of the respondent FEDERAL ELECTION COMMISSION by one Kenneth A. Gross, as Associate General Counsel of the respondent FEDERAL ELECTION COMMISSION and also by a copy of a letter to William C. Oldaker, Esquire, of the firm of Epstein, Becker, Borsody and Green, P.C., 1140 19th Street, N.W., Washington, D.C. 20036 as attorneys for EDWARD M. KENNEDY and THE COMMITTEE TO RE-ELECT SENATOR KENNEDY as

the respondents before the FEDERAL ELECTION COMMISSION. Both of these last-named documents are also attached hereto and incorporated herein by reference.

Jurisdiction is granted to this court by 2 USC 437g(a)(8)(A) and (B), redesignated as section 309 of the Federal Election Campaign Act providing for appeals from dismissal by the Federal Election Commission and by the Administratiave Procedure Act, 5 USC 551, et seq., the Federal Declaratory Judgment Act 28 USC Secs. 2201 and 2202, and the "Federal Question" statute, 28 USC 1331 and, with regard to constitutional questions properly raised herein, 2 USC 437h.

Petitioner requests the court to declare that the dismissal of the aforesaid complaint by the FEDERAL ELECTION COMMISSION ("FEC") was contrary to law and the Constitution and to direct the FEC as to the applicable law and to take action to

conform therewith within thirty (30) days. In the alternative, if the Court finds it within its power to do so, Petitioner requests this Court to find that respondents have violated the law as alleged in the Complaint filed with the FEC and order such relief as is appropriate under the laws of the United States.

Petitioner hereby informs the Court and the respondents that they will be filing subsequent hereto, pursuant to 2 USC 437h, a specific Complaint challenging the Constitutionality of the Federal Election Campaign Act and several provisions thereof, as applied in this instance to the petitioner-plaintiff and will be seeking the certification of constitutional questions to the full panel of the Court of Appeals which is provided for in that statute as well as the expedited procedure provided for therein generally since petitioner-plaintiff is duly registered to

vote for the President of the United States.

It is expected that the constitutional violations complained of in that complaint will embrace, or if decided in favor of petitioner-plaintiff, will render moot many of the errors of law for which petitioner--plaintiff seeks relief in this petition and that, therefore, the court may wish to postpone any action on that matter and the respondents may wish to defer any answer until such complaint is filed.

Petitioner-plaintiff files this petition at this time in order to preserve its right of appeal under 2 USC 437g and such other statutes named herein as they may be relevant to that right if appeal and intends to present the broader constitutional issues involved more fully in the complaint to be filed under 2 USC 437h.

Respectfully submitted,

ALWIN E. HOPFMANN

by: Laurence A. Elgin
Attorney for Petitioner-
Plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-3667

ALWIN E. HOPFMANN

Plaintiff,

v.

FEDERAL ELECTION COMMISSION,
et. al.,

Defendants.

MOTION OF THE FEDERAL ELECTION COMMISSION TO DISMISS NAMED RESPONDENTS EDWARD M. KENNEDY AND THE COMMITTEE TO RE-ELECT SENATOR KENNEDY

Pursuant to Rule 12(b)(1) and Rule 12(b)(6) of the Federal Rules of Civil Procedure, defendant Federal Election Commission hereby moves that Edward M. Kennedy and The Committee to Re-Elect Senator Kennedy be dismissed from this proceeding.

In support of this motion, the Federal Election Commission relies on its Points and authorities submitted herewith.

Respectfully submitted,

Charles N. Steele
General Counsel

Lawrence M. Noble
Assistant General Counsel

Marsha G. Gentner
Attorney

Deborah Felton
Attorney

FEDERAL ELECTION COMMISSION
1325 K Street, NW
Washington, DC

(202) 523-4060

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | | |
|---|---|---|
| ALWIN E. HOPFMANN, Plaintiff, | ) | Civil Action |
| v. | ) | No. 82-3667 |
| FEDERAL ELECTION COMMISSION, et al. Defendants. | ) | |

PLAINTIFF'S CONCURRENCE IN THE MOTION OF THE FEDERAL ELECTION COMMISSION TO DISMISS NAMED RESPONDENTS EDWARD M. KENNEDY AND THE COMMITTEE TO RE-ELECT SENATOR KENNEDY

Plaintiff, acting by and through his attorney, having studied the aforementioned motion of the defendant Federal Election Commission, and having studied the Memorandum of Points and Authorities filed in support thereof, in general agrees with the position taken by the defendant Federal Election Commission ("FEC") in the aforesaid motion, provided that, it is understood clearly that the dismissal resulting from such Motion will be without prejudice to the undertaking of a private cause of action by the plaintiff

when the additional steps in the FEC enforcement process alluded to by the defendant FEC in the aforesaid memorandum have been taken, and, provided further that,it is understood that plaintiff's contentions as to the unconstitutionality and illegality of the Federal Election Campaign Act as amended as it requires the exhaustive exhaustion of remedies referred to by the defendant FEC in the aforesaid Memorandum , are not affected by this concurrence with the Motion of the Defendant FEC.

Respectfully submitted,

Laurence A. Elgin
Attorney for Laintiff
Suite 307
1317 F Street, N.W.

Washington, D.C. 20004
202/628-1114
D.C. Bar No. 159582

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing PLAINTIFF'S CONCURRENCE IN THE MOTION OF THE FEDERAL ELECION COMMISSION TO DISMISS NAMED RESPONDENTS EDWARD M. KENNEDY AND THE COMMITTEE TO RE-ELECT SENATOR KENNEDY have been served by United States mail, postage prepaid, this 8th day of February, 1983, upon the following counsel: [all names of counsel are then listed.]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-3667

ALWIN E. HOPFMANN,

Plaintiff,

v.

FEDERAL ELECTION COMMISSION,

Defendant

PLAINTIFF'S FIRST AMENDED COMPLAINT
(Filed as a Matter of Course,
Pursuant to F.R.C.P. 15(a)

1. This action seeks declaratory and injunctive relief against certain provisions of the Federal Election Campaign Act et. seq. (hereinafter referred to as the FECA), the Federal Election Campaignb Act Amendments of 1974, Public Law 93-443, 88 Stat. 1236 (hereinafter referred to as the FECA Amendments of 1974), the Federal Election Campaign Act Amendments of 1976, Public Law 94-283, 90 Stat. 475 (hereinafter referred to as the FECA Amendments of 1976), the Federal Election Campaign Act

## INCORPORATION OF PETITION FOR APPEAL PREVIOUSLY FILED

7. Plaintiff hereby repeats the allegations of Paragraphs 1 through 6 above and incorporates them by reference herein together with the Petition for Appeal previously filed in this matter, which was entitled PETITION TO DECLARE FEDERAL ELECTION COMMISSION ACTION CONTRARY TO THE LAWS AND TO THE CONSTITUTION, which is also incorporated herein by reference.

## PARTIES

8. Plaintiff Alwin E. Hopfmann is a United States citizen from the State of Massachusetts. He is a citizen also of that State.

9. Plaintiff is eligible to vote in elections for the office of President of the United States. He is a registered voter in Massachsuetts in the Democratic Party.

10. In the 1982 Massachusetts primary race for U.S. Senator, Plaintiff sought the

campaign for U.S. Senatorial nominee of the Massachusetts democratic party in this instance and to compel Edward M. Kennedy and the Committee to Re-elect Senator Kennedy to do everything else necessary to comply with applicable law considering the primary campaign as having terminated at the pre-primary convention, including treating all contributions which were made thereafter as contributions to the general election campaign and not the primary, and

66. That the Court declare the FEC in violation of the laws and the Constitution of the United States in all particulars as set out herein, and enjoin any such further violations, declaring all such illegal and/or unconstitutional acts heretofore taken to be void, and

67. That the Court grant sucu other and further relief as may be appropriate or may be necessary in order to assure justice and compliance iwth the laws and the Constitu-

tion of the United States.

Respectfully submitted,

Laurence A. Elgin
Atorney for Plaintiff
Suite 307
1317 F Street, NW
Washington, D.C. 20004
202/628-1114
D.C. Bar No. 159582

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | | |
|---|---|---|
| ALWIN E. HOPFMANN, Plaintiff, | ) | Civil Action No. 82-3667 |
| v. | ) | |
| FEDERAL ELECTION COMMISSION, et al. Defendants. | ) | |

FEDERAL ELECTION COMMISSION'S REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

On February 15, 1983, defendant Federal Election Commission [hereinafter cited as FEC or Commission] received plaintiff Alwin Hopfmann's concurrence to the FEC's motion to dismiss Senator Edward M. Kennedy and the Committee to Re-elect Senator Kennedy, and opposition to the FEC's motion to dismiss for lack of jurisdiction, insufficiency of service of process, and failure to prosecute. The FEC submits the following reply to plaintiff Hopfmann's concurrence and opposition.

I. The Motion to Dismiss Senator Kennedy and the Committeeto Re-Elect Senator Kennedy Should be granted

In response to the Commission's motion to dismiss defendants Senator Edward Kennedy and the Committee to Re-Elect Senator Kennedy, plaintiff Hopfmann concedes that the FEC is correct in asserting that plaintiff has not satisfied the express conditions precedent to bringing a private cause of action for alleged violation of federal election laws. See 2 U.S.C. 437g (a)(8). Therefore, inasmuch as plaintiff Hopfmann has filed a concurrence to the FEC's motionto dismiss Senator Kennedy and the Committee to Re-Elect Senator Kennedy, those defendants should be dismissed from this action, with prejudice.1/

********

1/ The Commission seeks dismissal with prejudice because plaintiff cannot bring another action against Senator Kennedy and the Committee to Re-Elect Senator Kennedy in this context --i.e., a petition filed pursuant to 2 U.S.C. 437g (a)(8)(A) and (B) for review of Commission action. Of course, the Commission does not assert that should the statutory prerequisites of 2 U.S.C. 437g (a)(8)(c) subsequently be satisfied, plaintiff could not then bring a private cause of action against Senator Kennedy and the Committee to Re-Elect Senator Kennedy under that provision.

*******

WHEREFORE, for the reasons set forth above, defendant FEC requests that its motions to dismiss be granted.

Respectfully submitted,

_____
Charles N. Steele
General Counsel

_____
Lawrence M. Noble
Assistant General Counsel

_____
Marsha G. Gentner
Attorney

Deborah Felton
Attorney

Dated: February 23, 1983

FEDERAL ELECTION COMMISSION
1325 K Street, N.W.
Washington, D.C.

(202) 523-4175

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | | |
|---|---|---|
| ALWIN E. HOPFMANN, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | Civil Action |
| v. | ) | No. 82-3667 |
| | ) | |
| FEDERAL ELECTION COMMISSION, et al. | ) | |
| | ) | |
| Defendants. | ) | |

PLAINTIFF'S REBUTTAL AND CLARIFICATION OF CERTAIN ISSUES AND REPRESENTATIONS RAISED BY DEFENDANT

In response to the reply filed by the FEC, plaintiff would like to make the following points:

1. Plaintiff's objection to the dismissal of Kennedy and his Committee with prejudice continues, as does its qualification of its concurrence with the FEC's motion in that regard. Plaintiff has alleged in its constitutional bill of particulars that various constitutional rights, and in particular, the rights of equal protection of the law have been violated by the FECA. Therefore,

plaintiff requests that its order be adopted and the dismissal be without prejudice in order that plaintiff's rights may be preserved in the event that it is held that requiring plaintiff to exhaust further administrative remedies is in effect unconstitutional.

*******

Respectfully submitted,

Laurence A. Elgin
Attorney for Plaintiff
Suite 307
1317 F Street, N. W.
Washington, D. C. 20004
202/628-1114
D. C. Bar No. 159582

[stamped] RECEIVED AT THE FEC
[HANDWRITTEN] 6a # 8620

[stamped] 82 Oct 8 P2:01

EPSTEIN BECKER BORSODY & GREEN, P.C.
ATTORNEYS AT LAW
1140 19TH STREET, N.W.
WASHINGTON, D.C. 20036

(202) 861 0900

********

[NAMES OF FIRM MEMBERS ON LETTERHEAD]

October 7, 1982

Charles N. Steele, Esquire
General Counsel
Federal Election Commission
1325 K Street, N.W.
Washington, D.C. 20463

Re: MUR 1468

Dear Mr. Steele:

In accordance with the instructions of Kenneth A. Gross, Esq., in his letter of September 16, 1982 and the requirements of 2 U.S.C. 437g(a)(1), the Committee to Re-Elect Senator Kennedy (the "Committee") submits this letter in support of its position that no action should be taken against it on the basis of the complaint. The complaint which precipitated this MUR can be distilled down to one underlying allegation; the nominating procedure of the Massachusetts Democratic Party for United States Senator was completed at the party's convention of May 21 and 22, 1982 and not by the September 14, 1982 primary election when Senator Kennedy was nominated as the Democratic party nominee for United States Senator. Based on this

premise, the complainant asserts that the Committee has violated just about every reporting requirement,and contribution and expenditure limitation governing federal elections.

The complaint is utterly without merit in that it misconstrues Massachusetts law, the Federal Election Campaign Act of 1971, as amended (the "Act"), 2 U.S.C. Secs. 431 et seq., and the regulations promulgated thereunder, 11 C.F.R. Secs. 100.1 et seq. Hence, the Commission is urged to find that there is no reason to believe that a violation of the Act has been committed.

The Commission has consistently held that in order to determine whether a party convention has authority to nominate a cndidate and thus be deemed an "election" within the meaning of 2 U.S.C. Sec. 431(1)(B) hinges on an analysis of state law pertaining to the power and role of political party conventions in the nominating of candidates for Federl office. See Adivsory [sic] Opinions 1978-30, Fed. Elec. Camp. Guide (CCH) Par. 5320; 1976-58, Fed. Elec. Camp. guide (CCH) par. 5211. Massachusetts law recognizes that the Democratic party and its members enjoy a constitutionally protected right of political association. Opinion of the Justices of the Massachusetts Supreme Judicial Court, at 4 (April 23, 1982). The affairs of the Democratic party, therefore, must be under final authority of the State Convention, the highest authority of that party. See Charter and Platform of the Democratic Party of the Commonwealth of Massachusetts, Article Six, Section I.

This authority, however, does not

extend to nomination of the individual who will run in the general election as the Democratic nominee for the United States Senate. Under Massachusetts law, it is the winner by a plurality of the Democratic party primary who becomes the party's candidate for the Senate. G.L. c. 53 Sec. 2. Since it is the registered Democrats and Independents who select the party's candidate in Massachusetts, and not the State Convention, that convention does not have authority to nominate candidates for the United Staes Senate and does not constitute a separate election within the meaning of 2 U.S.C. Secs. 431(1)(B). See Advisory Opinion 1978-25, FEd. Elec. Camp Guide (CCH) Par. 5320.

It is irrelevant that the name of no other candidate appeared on the Democratic party ballot. The reporting, contribution and exenditure limitations apply with respect ot each election in which a candidate for the U.S. senate seeks nomination or election. See 2 U.S.C. Sec. 441a(a)6; 11 C.F.R. Sec. 110.1(j)(1). Indeed, the regulations go on to provide that an election in which a candidate is unopposed is still a separate election. 11 C.F.R. Sec. 110.1(j)(2). It is of no consequence that the candidate has received the endorsement of his party prior to running unopposed in the primary. Advisory Opinion 1978-41, Fed. Elec. Camp. Guide (CCh) Par. 5331.

Finally, it must be noted that Senator Kennedy was not the only candidate eligible voters could cast their ballot for oN September 14, 1982. Nothing in the Democratic Party Charter, nor the laws of Massachusetts preclude write-in voting. In that same view, there is nothing in the

Charter or State law which prohibits an individual who does not receive an endorsement of the party within the meaning of Article Six, Section III of the Charter, from mounting such a campaign.

Senator Edward M. Kennedy was nominated on September 14, 1982 to be the Democratic party candidate for the general election to the United Staes Senate. As such, all contributions received the Committee to Re-Elect Senator Kennedy, prior to that date were for the primary election. Furthermore, compliance with the filing and reporting requirements of the Federal Election Laws must be viewed from that date.

Respectfully submitted

William C. Oldaker

THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF THE ATTORNEY GENERAL
STATE HOUSE, BOSTON

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

June 3, 1982

Secretary of State
Michael Joseph Connolly
State House
Room 340
Boston, Massachusetts 02133

Dear Secretary Connolly:

I write to request that you reconsider your decision to exclude from the Democratic primary ballot those individuals who have met all the requirements of state law to qualify themselves as candidates for nomination but failed to receive at least 15 percent of the votes cast at the recent Democratic Convention. I know, from our joint submission to the Supreme Judicial Court on the questions propounded by the Governor concerning the so-called "15% Rule" and our prior communication on that subject, that you are not a supporter of the rule and made your decision in part because of a desire to secure a "prompt and just judicial resolution" of the issue. I am also aware of your attempt to harmonize the discordant party rule with state law in accordance with the thrust of the April 23rd Opinion of the Justices.

Nevertheless, I believe state law requires you to cause the names of the excluded candidates for nomination to be printed on the ballot and therefore will not defend your decision in the civil actions now pending before state and federal courts. Furthermore, it is my

current intention to file a complaint in a state court naming you as a defendant and seeking relief in the nature of an order of mandamus, compelling you to fulfill your ministerial duties and to include the names of these individuals on the ballot.

My decision was not an easy one and it would be impossible for me to fully articulate my reasoning in this brief request that you reconsider. Certain essential points, however, do bear highlighting. First, the Opinion of the Justices on which you rely, was purely advisory and is entitled to no stare decisis effect. Furthermore, it did not deal with the question of the scope or validity of the existing state laws concerning candidates for nomination at state primaries; instead the Justices answered one question concerning a proposed law and explicitly declined to answer a second as to whether, under pre-existing law, "a candidate may be placed on the...ballot by nomination papers without having received fifteen percent of the vote at the party convention". 385 Mass. 1201, 1202-3 (1982).

By deciding not to place candidates' names on the ballot unless they received fifteen percent of the vote, you have answered the question left open by the Court in its advisory opinion. Frankly, such decisions are not committed to your discretion. As Secretary of the Commonwealth, you are not authorized to decline to follow a statute's explicit commands based on your views as to its constitutionality, whether on its face or as applied. See, e.g., Tsongas v Secretary of the Commonwealth, 362 Mass. 708, 713 (1972); School Committee of

Springfield v Board of Education, 362 Mass. 417, 431-432 (1972). It may well be that a court of competent jurisdiction will decide that the names of the candidates who failed to receive the support of fifteen percent ofthose voting at the convention may not appear on the ballot, but under our system of government with its doctrine of separation of powers,that is a matter for the judicial and not the executive branch of goernment. In the instant case, your understandable doubts about the constitutionality of the statutory scheme could have been appropriately resolved in a variety of ways, including both the active step of seeking declaratory relief under G.L.C. c. 231A and the passive step of following the applicable state statutes and defending them in any litigation which might result. See, School Committee of Springfield, 362 Mass. at 432. Either course of conduct could have secured the "prompt and just judicial resolutin" you seek. In the absence of a judicial declaration of a constitutional violation, however, I believe you lack authority to exclude otherwise qualified candidates for nomination from the ballot.

In closing, I note that you have requested that I authorize Samuel Hoar, John Kenneth Felter and Paul F. McDonoough, Jr. to appear for you in the cases in which I decline to represent you. I hope it will be unnecessary to reach this issue because you will have reconsidered your decision to exclude those candidates who have filed suit against you. In accordance with the procedures outlined in Secretary of Administration and Finance, 367 Mass 154, 165 n. 8 (10075), I hereby authorize their appearance in the event your position

remains unchanged.

Very truly yours,

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

Supreme Court, U.S.
FILED
NOV 27 1985
JOSEPH F. SPANIOL, JR.
CLERK

(6)

No. 85-659

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Respondents,

# PETITION FOR THE WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

## Reply Brief of Petitioner

Laurence A. Elgin
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28 P

No. 85-659

IN THE SUPREME COURT OF THE UNITED STATES
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PETITION FOR THE WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

# Reply Brief of Petitioner

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Washington, D.C. 20008
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# PETITIONER'S REPLY BRIEF

## ARGUMENTS IN REPLY

If a party convention has authority to nominate, it's an election as a matter of federal statutory law. Whether the FEC properly regarded this law in dismissing petitioner's complaint is the key question raised by petitioner under 2 U.S.C. 437g. This the FEC concedes: "Thus, the determinative question in this case was whether the 1982 Massachusetts Democratic Pre-Primary Convention had the 'authority to nominate a candidate.'" (Opp. Br. p.8)

The FEC gives two reasons why, in its opinion, the jaybird convention did not have authority to nominate. The first is that, as the FEC sees it, the nomination process did not terminate with the jaybird convention's having eliminated Defendant Kennedy's only opponent from the ballot. An undemocratic style ballot with only one choice, in the FEC's view, is not an empty exercise because, though the formalities of such a primary offer no real say to the

voter, petitioner could have run a write-in campaign, had he wanted to.

The second reason the FEC gives to support its contention for lack of authority to nominate is that the word "authority" does not quite mean what it seems to under the test of plain meaning. Instead, in the FEC's view, the word is qualified by a qualification which is now argued in the opposition brief.

This enlarged argument obfuscates the clear concession above. It is the argument that "only if a convention has legal authority" (emphasis added) to nominate is it an "election" under the statutory definition. (Opp. Br. p.8) Thus the FEC argues that there may be authority to nominate that isn't legal, and which, therefore, by that conclusion alone, does not fit within the statutory definition, not because of any language in the statute, but simply because the FEC

has so decided without statutory exegesis. In this the FEC does not admit the real problem posed by a "jaybird" convention, i.e., does a jaybird convention which is given formal state authority outside the normal lawmaking channels have the authority posited by 2 U.S.C. 431 (1)(B) ? Petitioner's question presented no. 3.

This argument violates two important canons of statutory construction developed by this Court in numerous cases.

The FEC held clearly, in dismissing the administrative complaint, that the 15 percent rule convention had authority to do what it did do, which was what the FEC euphemistically called the "winnowing out" of Mr. Hopfmann as the only candidate opposing Mr. Kennedy. (Pet. App. A-11). For the FEC asserted that this "winnowing out" was required by law: "Under Massachusetts law, no candidate for a primary election will be placed upon the

ballot who does not comply with the fifteen percent rule of the party." (Pet. App. A-2, citing "Mass. Gen. Laws Ann., ch. 53, Sec. 44, (West 1975).") If candidates are required by law to comply with the rule, the rule must be law in the FEC's view and the party, in holding the jaybird convention, has authority to apply the rule. The FEC's argument is that the convention, though it "winnows out" by authority, does not, thereby, nominate. The only reason for this conclusion is one extraneous to the clear language of the statute -- the availability of the write-in candidacy possibility.

This argument adds a qualifier to the language of 2 U.S.C. 431 (1)(B), and so falls afoul of petitioner's argument that it is up to the courts to say what the law is, as based on Marbury v Madison, 2 US (1 Cranch) 60, 73 (170) and Allied Chemical & Alkali Workers v PPG Co, 404 US 157, 182.

(Pet. p.49) This Court unanimously said in Bread Political Action Committee v FEC, 455 US 577, that analysis of construction of a provision of the Federal Election Campaign Act (FECA) "must begin with the language of the statute itself." (Emphasis added.) The common meaning of statutory language itself is adhered to unless there is legislative history to the contrary. In support the Court cited two cases: Dawson Chemical Co. v Rohm & Haas Co., 448 US 176, 187; and Consumer Product Safety Commission v GTE Sylvania,Inc.,447 US 102.

Dawson held: "It is axiomatic, of course, that statutory construction must begin with the language of the statute itself." As said in CPSC: "the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." 1

Here we have the mere promulgation of a position without "concommitant exegesis of the statutory authority." As such, it lacks "power to persuade." Adamo Wrecking

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[1] Petitioner argues that 2 U.S.C. 431 (1)(B) means exactly what it says. Repeatedly the FEC and the lower courts have ignored the rule of "plain meaning." Our reply below, e.g., said "B: UNAMBIGUOUS STATUTORY LANGUAGE DOES NOT CALL FOR AN INTERPRETATION/ We suggest that 'which has authority to nominate a candidate means precisely what it says. It is not an ambiguous statement. Indeed, it was precisely to remove any possible ambiguity that Congress made the definitional change in 1976....[from 'convention held to nominate' to 'convention with authority to nominate.'] The FEC's discovery of ambiguity in this provision comes late in the day. It is discovered for purposes of defeating the present plaintiff. The position of the FEC is inconsistent with the statute's plain language. This court should not abandon its duty to make the FEC comply with clear legislative intent. This court has ruled, 'It is the function of the courts to require agencies to comply with legislative intent when that intent is clear.' Natural Resources Defense Council, Inc. v Costle, 568 F.2d 1369, 1381 (D.C. Cir. 1977). The FEC would have this court substitute the exception for the rule and defer to the FEC's 'expertise' without even considering the question of whether the statutory meaning is clear."

Co. v U.S., 434 US 275,287. It's not true here that the "Court of Appeals appropriately observed that more than one interpretation of the statutory language has a surface plausibility." Dawson, supra. It's not plausible on the surface of the statutory language that Congress meant to exclude authority which does not come from the legislature, but nonetheless comes from the state through a friendly state court advisory opinion as relied upon by a friendly state official in charge of ballots who is, after all, operating by virtue of the color and authority of his office. It is not plausible, in other words, to assume that Congress intended legal convention elections to be held accountable but not jaybird elections unless there is some clear legislative history indicating that intent, or some consistent judicial precedent leading to that conclusion. The FEC tries to reverse

the burden of demonstrating legislative intent by asserting that petitioner has not shown any legislative history that the statutory language means what it says. (Opp. Br. p.10) It is the FEC's position that petitioner must demonstrate legislative history that varies from the FEC's narrowing interpretation. This is an exercise in attempting to assume a very weak point in argument so as to hopefully forestall its being properly examined.

There is no language here that is "generic and freighted with a meaning derived from the decisional history that preceded it." Adamo, supra. There are no cases prior to this deciding the meaning of this statutory definition.

What the FEC has done here is resort to the extrinsic circumstance of the availiability of the possibility of a write-in candidacy rather than beginning with the language of the statute. That is

forbidden. Caminetti v U.S., 242 US 470.

The word "authority" has a well established meaning in governmental law. As stated in Black's Law Dictionary, it is "the right and power of public officers to require obedience to their orders lawfully issued in the scope of their public duties." Secretary of State Connolly had the power to exclude petitioner from the ballot by virtue of his office whether he was acting extralegally in doing so or not, (His own Attorney General advised him that he was not within his authority, but he chose to obey the advisory opinion of the Supreme Judicial Court.) (Supp. H) What matters is what is "properly understood" as a matter of "common usage." CPSC v GTE Sylvania, supra.

This argument by the FEC has made it clear that the decision below is a direct challenge to this axiomatic and elementary canon of statutory construction as set

out in the precedents of this Court cited above and is yet one more reason why cert should be granted in this instance. If the decision below is allowed to stand, there is great danger that this "plain meaning" canon of statutory interpretation as set out in the cases above will be undermined by agencies substituting their policies for legislative decisions.

The FEC's doing this in this instance is material to petitioner's contention concerning the impropriety of the FEC's having sanctioned with the federal imprimatur the extralegal assertion of alleged First Amendment power by Secretary Connolly in giving authority to the "jaybird" convention. Had the FEC analyzed state law as it actually was, rather than accepting the state court's version of the radical First Amendment claim, it would have had to recognize the convention as authorized but extralegal,

there being nothing before it at the time but a state court advisory opinion. It would then have had to face 2 U.S.C. 431 (1)(B) as meaning what it says and would have had to act upon the administrative complaint. Instead it continues to insist the party rule is state law, inserting this novel but erroneous legal argument in its counterstatement of the case as if it were an assertion of legislative fact when it is a radical assertion of the freedom of association concept. (Opp. Br. p.3).[2]

Even if it were assumed, strictly for purposes of argument, that such activist

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[2] This technique, of course, is SOP in government agency briefing. It might properly be called the Davison Technique, after the late Professor J. Forester Davison, who taught Administrative Law for many years at the George Washington University Law School and co-authored the Davis and Grundstein casebook on administrative law. Professor Davison always gave a lecture in every one of his courses on this technique which he described as the "secret" of writing a winning government agency brief: "Assume your weakest point and then write your

statutory construction and intepretation were in order here, the FEC has still failed to comply with the applicable canon controlling such interpretation. The FEC claims the deference due an interpretive rule. In so doing it ignores that it is not using rules promulgated in accord with the Administrative Procedure Act, but rather using its advisory opinions, which do not comply with rulemaking requirements that federal agencies operating within the law are required to comply with and thus are not legitimate interpretative rules.

Let us make the further assumption, for the sake of the argument, that proper rulemaking requirements were complied with. In that case the deference to be given an interpretive rule depends upon the thoroughness evident in the agency's consideration, the validity of its reasoning, its consistency with earlier

and later pronouncements, and all those factors which give it power to persuade. Skidmore v Swift & Co., 323 US 134,140; SEC v Sloan, 436 US 103, 117-118; Adamo Wrecking, supra, Batterton v Francis, 432 US 416, 425; CPSC, supra. That the FEC was not thorough in its consideration here can be amply seen by examining its opinion (Pet. App. A) in conjunction with the letter it received from the counsel for defendant's Edward M. Kennedy and the Committee to Re-elect Senator Kennedy.[3]

brief as if it were uncontested."

[3] It is not true, as respondent FEC asserts, that the names of these two defendants/respondents were erroneously included in the petition. (Opp. Br. (i) note at bottom) Nor is the FEC assertion that petitioner "acceded" to its motion to dismiss Senator Kennedy and his committee strictly accurate. Neither of these two defendants has ever been dismissed because the petitioner and the FEC were unable to reach agreement on the conditions attached to petitioner's conditional concurrence in the FEC motion to dismiss Senator Kennedy and his committee. To clarify the matter, the filings back and forth on this point are included in the Supplementary Appendix: Supp. B, the FEC's motion to

(Supp.-G) The one simply echoes the other.

dismiss Senator Kennedy and his committee; Supp. C, petitioner's "concurrence" conditioned upon the dismissal being without prejudice to renewal of the complaint against Senator Kennedy and his committee or to the petitioner's constitutional challenges; Supp. E, the FEC's reply to the raising of these conditions by the petitioner which, significantly, was filed after the amended complaint and was entitled by the FEC, "FEDERAL ELECTION COMMISSION'S REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS (Emphasis added;) (Thus, petitioner's conditional "concurrence" was treated by the FEC as an opposition and responded to as such after the amended complaint was filed; Supp. F. petitioner's rebuttal and clarification to the reply of the FEC. The amended complaint only named the respondent FEC in its style because it was principally devoted to the 2 U.S.C. 437h, (Buckley Provision), constitutional challenges then being newly brought, which were only being brought against the FEC. But it did, in paragraph 7, refer back to, and incorporate by reference the entire petition originally filed under 2 U.S.C. 437g to appeal the FEC dismissal of petitioner's administrative complaint by the FEC, including the style of that petition. So it is clear that the FEC never entertained any illusion that Senator Kennedy and his re-election committee had been dropped from the case in any way until now. It is entirely too late in the day for the FEC to be making any motion in that regard now. The original, unresolved motion, is not before this Court.

The letter's assertions appear to have been accepted without any independent inquiry. Just reading the advisory opinion of the state court attached to the administrative complaint would've revealed that the execution of the party rule as a private law was pursuant to a claimed right under the First Amendment, not to state laws. The invalidity of the FEC's reasoning in its interpretive "rules" can be seen in that its rested exclusively upon the assertion that barred ballot access does not terminate a nomination process because of the unexercised possibility of a write-in effort. The FEC had no earlier pronouncements about jaybird conventions. So consistency with earlier holdings by the FEC cannot be determined by anything on all fours. But its decision to equate such conventions with ones that don't have power to exclude from the ballot, such as in Colorado, on

the one hand,and to equate such conventions, taken together with the ensuing period until the "predetermined" official primary, to uncontested races, on the other hand, argues against the power of FEC reasoning to persuade. The FEC later propounded an advisory opinion consistent with its interpretation in this case, AO 1984-16. This was for a fellow member of Sen. Kennedy's state party organization. This, to crib from the winning briefs in CPSC, was a litigation tactic, not a statutory interpretation. It fails the test of Udall v Tallman, 380 US 1, 18. It clearly wasn't pursuant to policy adopted before the present controversy arose or was thought of. The lack of persuasive power in reasoning is seen in claiming the convention was not an election because it was merely a "winnowing out."

Thus, the newly enlarged argument of the FEC that the convention was not an

election because not legally authorized fails the Skidmore test as well. This canon of statutory construction does apply to the FECA. FEC v Dem. Sen. Camp. Comm., 454 US 27. The inconsistency of the FEC's interpretation in this case with its own rulemaking, as properly exercised, is shown by 11 CFR 100.2 (e), which says nothing about being "legally" authorized.

Again, here is an interpretative canon of this Court's cases that would be challenged by the lower court decisions herein if this petition isn't granted so that the matter may be clarified.

The use that the FEC made of its own advisory opinions in violating these two major canons of statutory construction illustrates why the advisory opinion power presently in the FECA must be more tightly circumscribed. At least in CPSC, supra, the CPSC tried to undermine language in its enabling act with another statute,

albeit one of general application. The FEC here has used its Advisory Opinions, that it can make itself, for this purpose. The Court will recall how, in the FEC's battles with Nat'l Cons. Pol. Action Comm. and the Fund for a Conservative Majority, the FEC has used its advisory opinion power as if it were an Art. III court to challenge a 4-4 affirmance by this Court. The FEC persists in misconstruing petitioner's argument in this regard. The FEC here used its AO powers to mount a challenge to both canons of interpretation discussed above in order to affirm a radical assertion of First Amendment authority by a state tribunal. This is to act as an Art. III court and thereby violate the Case or Controversy provision while illustrating the constitutional weakness of the FECA. The FEC here does not confine its advisory opinion power as an administrative agency must. It hasn't

obeyed APA requirements regulating agency rulemaking nor those governing agency case decisions. It has here sought to alter the language of CFR about conventions.

The FEC raises another new argument in its brief that is so confused it must be replied to. It argues that petitioner has waived his right to protest the participation of the Secretary of the Senate in the FEC. (Opp. Br. p.14) The argument about the Secretary's participation is brought as part of petitioner's challenges pursuant to 2 U.S.C. 437h, which commands the petitioner do exactly as he did. The cases cited by the FEC are inapposite, having nothing to do with such a statutory mandate. The FEC confuses challenges to the constitutionality of specific agency acts with those to the provisions of the FECA as applied, brought pursuant to the direct mandate of 2 U.S.C. 437h.[4]

The FEC now says the standard of review is: arbitrary, capricious, an abuse of discretion or otherwise contrary to law. In its Rule 56 Motion below the FEC argued (support memo, pp. 5-6): "It is well established that in order to find that the Commission acted contrary to law, it must be shown that the Commission acted arbitrarily or capriciously, or abused its discretion." Attempts to point out the rest of the standard to the FEC and the lower courts were responded to with the kind of name-calling demonstrated in the opposition brief. We urge the Court to grant cert in this case so that the FEC begins to heed what it now, for the first time, admits it is bound by.

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4 Nor is the new argument raised by the FEC in its final footnote accurate. On the one occasion that the FEC missed a filing deadline, it, like the petitioner, moved for an extension out of time.

Respectfully submitted,

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November 27, 1985

CERTIIFICATE OF SERVICE

I hereby certify that I have served, by United States Mail, First Class, postage prepaid, this 27th day of November, 1985, true and accurate copies of the foregoing Reply Brief and Appendix, Vol. 2, Supplementary, three copies each upon Charles N. Steele, Esq., General Counsel, U.S. Federal Election Commission, 1325 K Street, N.W., Washington, D.C. 20463; William Oldaker, Esq., counsel for respondents Edward M. Kennedy and the Committee to Re-elect Senator Kennedy (3 copies for each), 1140 19th St., N.W., Wash. D.C. 20036; Hon. Edwin P. Meese, Esq., Att'y Gen. of the U.S., U.S. Dep't of Justice, 1111 Main Justice Building, Wash. D.C. 20530; U.S. Att'y for the District of Columbia, U.S. Courthouse, Washington, D.C. 20001.

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